REPUBLIC OF TURKEY
ANKARA UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES

DEPARTMENT OF INTELLECTUAL PROPERTY RIGHTS, TECHNOLOGY POLICIES AND INNOVATION MANAGEMENT

LEGAL ISSUES CONCERNING PLAIN PACKAGING OF TOBACCO PRODUCTS AND IMPLICATIONS FOR TURKEY

Master's Thesis

Barış SEVEN

Ankara, 2020

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DEPARTMENT OF INTELLECTUAL PROPERTY, TECHNOLOGY POLICIES AND INNOVATION MANAGEMENT

INTELLECTUAL PROPERTY LAW (ENGLISH)

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Date of the Thesis Examination

The examination was conducted online on 29.05.2020 at orgun.ankara.edu.tr.

TO THE REPUBLIC OF TURKEY
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DIRECTORATE OF GRADUATE SCHOOL OF SOCIAL SCIENCES

I hereby declare that all information in my master thesis titled "Legal Issues Concerning Plain Packaging of Tobacco Products and Implications for Turkey" which has been prepared under Assist. Prof. Dr. Selin Özden Merhacı's supervision has been gathered and submitted in compliance with academic rules and ethical conduct principles and the data obtained from other sources have been duly indicated both in the text and references. I also declare that I have acted according to scientific research and ethical rules during the study process and if otherwise come forth, I will accept all legal consequences. (…../…../……)

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§ CHAPTER TWO

OVERVIEW OF LEGAL DISPUTES CONCERNING PLAIN PACKAGING LEGISLATIONS OF CERTAIN COUNTRIES

ABBREVIATIONS

ACS	: American Cancer Society
Art.	: Article
BAT	: British American Tobacco
BIT	: Bilateral Investment Treaty
Ch.	: Chapter
CJEU	: Court of Justice of the European Union
CoA	: Court of Appeals
COP	: Conference of the Parties
Cth.	: Commonwealth
DSB	: Dispute Settlement Body
DSU	: Dispute Settlement Understanding
ECHR	: European Convention of Human Rights
ECtHR	: European Court of Human Rights
Ed.	: Editor
Eds.	: Editors
FET	: Fair and equitable treatment
ECJ	: European Court of Justice
EU	: European Union
FCTC	: Framework Convention on Tobacco Control
FTA	: Free Trade Agreement
GATT	: General Agreement on Technical Barriers to Trade
GI	: Geographical indication
ICSID	: International Centre for Settlement of Investment Disputes

IP	: Intellectual property
ISDS	: Investor-State Dispute Settlement
INB	: Intergovernmental Negotiating Body
JTI	: Japan Tobacco International
LIP	: Law on Industrial Property
NL	: Netherlands
No.	: Number
p.	: Page
PAHO	: Pan American Health Organization
para.	: Paragraph
PM	: Philip Morris
PMA	: Philip Morris Asia
pp.	: Pages
SCJ	: Supreme Court of Justice
SPR	: Single Presentation Regulation
QUT	: Queensland University of Technology
TAPDK	: Tobacco and Alcohol Market Regulatory Authority
TBT	: Technical Barriers to Trade
TCA	: Tribunal de lo Contencioso Administrativo
TPP	: Tobacco Plain Packaging
TRIPS	: Trade-Related Aspects of Intellectual Property Rights
TürkPatent	: Turkish Patent and Trademark Office
UK	: United Kingdom
UNCITRAL	: United Nations Commission on International Trade Law
UNCTAD	: United Nations Conference on Trade and Development

UNTS : United Nations Treaty Series

USA : United States of America

WHA : World Health Assembly

WHO : World Health Organization

WTO : World Trade Organization

INTRODUCTION

Tobacco can be described as "the only legally available consumer product that kills through normal use[1]." It is a highly addictive product that is still among the first causes of preventable deaths around the world, even though its fatal effects were scientifically proven decades ago. In order to tackle the global epidemic caused by tobacco use, much effort has been made in order to help people stop smoking and prevent new consumers from picking up the habit, by means of implementing tobacco control measures.

Some of the measures aimed at reducing the demand to tobacco products regulate the representation and labelling of tobacco products. Such measures were designed to eliminate the features of packaging that impact the consumers' perceptions about tobacco products. Within this context, removal of features such as colour, logos, brand images or any other sign or information placed on tobacco products and their packaging have been suggested by public health experts. This novel measure chiefly standardizes packaging of tobacco products by mandating packs to be in uniform shape, size and colour. It further standardizes the labelling of products by mandating simple brand names written in a uniform font, size and colour.

Not surprisingly, governments' adoption of the described measure which has been commonly called "plain packaging" as a public policy was not well-received by the tobacco industry[2]. As a matter of fact, there has been an everlasting dispute between the

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[1] WHO, An International Treaty for Tobacco Control, 12 August 2003, available at <https://www.who.int/features/2003/08/en/>. (last accessed: 01.09.2019)

[2] This measure is also referred to as "standardized" or "uniform" packaging in some jurisdictions. However,

tobacco companies and such state policies, due to the commercial interests of the tobacco companies that conflict public health objectives of the states which are aimed to reduce tobacco use. For this reason, tobacco industry has infamously used all political and legal means to try and stop governments from adopting such measures. In this context, plain packaging has been the latest front of the battle fought between public health and tobacco.

The inherent conflict between the interests of the tobacco industry and public health has been illustrated in the issue of plain packaging in extreme ways. The main reason for that is the impact of plain packaging on the use of trademarks. Intellectual property rights, such as trademarks or designs, are among the most valuable assets considering their significance in the global trade. Trademarks in particular serve as a protection of the brand image that distinguish one business and its products from others. Considering the global tobacco market where multinational companies are globally known for their brands such as Marlboro or Camel, their brand images are invaluable. Plain packaging eliminates the use of these brands by prohibiting colours and logos. It allows for the use of brand names, however, only in prescribed font and size. From the perspective of trademark law, use of many tobacco brands duly registered and protected as trademarks are prohibited by plain packaging. Severity of this measure is even more evident when considering the advertising, promotion and sponsorship bans have been implemented in most jurisdictions concerning tobacco-related brands. In such cases, the use of tobacco-related brands would be completely forbidden, meaning that tobacco companies would be deprived of some of their most valuable assets. Therefore, tobacco industry has rigorously opposed implementation of plain packaging, on the basis that it violates their trademark rights protected by international treaties and domestic laws. The

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the term “plain packaging” will be used in this thesis.

arguments of tobacco companies were not to be taken lightly, as they were based on sound arguments related to protection of intellectual property rights.

After Australia adopted the world's first plain packaging measures in 2012, the legal challenges were mounted by tobacco companies as soon as possible. In addition to the challenge brought under Australian Constitution, an investment treaty arbitration was commenced by the tobacco industry. Furthermore, on the basis that Australian plain packaging violated WTO agreements, WTO's dispute settlement panel was established to hear the complaints made by several member states. In the meantime, tobacco control measures adopted by Uruguay that were similar to plain packaging were also challenged in an investment treaty arbitration. These disputes generated a lot of questions concerning the legitimacy of public health policies that restrict certain rights of private parties under both domestic laws and international laws.

Tobacco industry has not prevailed in any of the mentioned legal challenges. Besides, the number of countries that adopted plain packaging have advanced after Australia and Uruguay successfully defended itself. Nevertheless, the sword of Damocles still hangs over the national governments that pursue similar public policies, as the tobacco industry has the chance to further exploit the right to bring legal actions against states' regulatory measures under international trade and investment agreements.

At the time of the writing of this thesis, Turkey has adopted plain packaging for tobacco products and implemented it by the end of 2019. This thesis was prepared with an aim to consider the legislation that introduced plain packaging in Turkey under the light of implications derived from the landmark cases of Australia and Uruguay. Firstly, we will briefly discuss the background of plain packaging in the first chapter. By doing so, we will lay down the rationale underlying this measure from the perspective of tobacco control. Defining the specific purposes of plain packaging is important, as they

demonstrate that the measure is not arbitrary, and were adopted under legitimate public health considerations. We will also discuss the FCTC and its related documents, since they constitute a basis for the adoption of tobacco control measures, including plain packaging.

In the second chapter, we will explore the main legal issues arose in the landmark cases of Australia and Uruguay. Within the context of this thesis, these cases were picked as they allow us to elaborate on plain packaging's interference with constitutional rights, investment treaties and WTO agreements. Uruguay's case was included for the purpose of exploring the arbitral tribunal's consideration of the merits of a similar case, since the case against Australia was dismissed on jurisdiction.

The legal issues that arose from these disputes cut across various areas of law such as public health, intellectual property rights, international trade, investment treaty arbitration and human rights. With the lessons learnt from these disputes, we will consider the Turkish legislation in the third chapter, centering our study on the use of trademarks. With an aim to provide a broader perspective on Turkey's position, we will first give an overview of the history of Turkish tobacco market, as well as the state policies concerning tobacco. Then, we will discuss the legislative process of plain packaging in Turkey and examine the related provisions of the law. Thereafter, we will consider the impact of plain packaging from the perspective of Turkish trademark law, by mainly considering the legal consequences of non-use of trademarks. In conjunction with our findings, we will then consider how plain packaging interferes with fundamental rights and freedoms of private parties under the Turkish Constitution, and try to determine the main issues that should be considered about the constitutionality of the measure. Finally, we will discuss the international obligations of Turkey and make some suggestions to be on the safe side legally.

§ CHAPTER ONE

BACKGROUND OF PLAIN PACKAGING

I. INTRODUCTION TO TOBACCO CONTROL

It has been revealed by many scientific studies that use of tobacco is related to a wide range of non-communicable diseases and is "the leading preventable cause of death in the world". According to the World Health Organization (WHO), tobacco was the cause of 100 million deaths in the 20th century[3].

Exploration of the links between smoking and non-communicable diseases spurred the idea of imposing control measures against the use of tobacco among the scholars. First interactions to build upon this idea in a collective effort date back to 1950s when individual scientists who work on cancer research began to exchange ideas. More formal and sustained international initiatives began in the mid-1960's, along with the publication of reports prepared by national medical authorities that created an increasing social awareness concerning the deathly effects of tobacco use[4].

During the period between late 1960's and late 1970's, there have been significant developments concerning the international efforts related to tobacco control. Three World Conferences on Smoking Health were organized by the American Cancer Society (ACS)

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[3] WHO, Facts and Figures about Tobacco, 2006, available at: <https://www.who.int/tobacco/fctc/tobacco%20factsheet%20for%20COP4.pdf>. (last accessed: 01.09.2019)

[4] Reubi D./ Berridge V.: The Internationalisation of Tobacco Control, 1950–2010, Medical History 60 (4), October 2016, pp. 453-472.

in 1967, 1971 and 1975[5]. Following the conferences, WHO recognized the adverse public health effects of tobacco and made tobacco control one of its priorities. It also issued a range of resolutions and reports stressing the harms of tobacco use and calling member states to act against it.

Another important initiative was the "Smoking and Lung Cancer Programme" developed by the International Union against Cancer with the aim of sharing useful information among the national societies working on tobacco control.

These significant international tobacco control initiatives brought together the experience and findings of the tobacco control experts from individual countries. The world conferences organized by the ACS continued in 1979, 1983, 1987, 1990 and 1992 with an increasing participation and international coordination[6]. In the meantime, keeping tobacco control on its top priorities, WHO expanded its efforts and established the Tobacco or Health Programme[7].

As the awareness on the dangers of tobacco use was increasing, most of the states have progressively recognized the urgent need to control tobacco use which became the most serious threat to public health. Therefore, many states started to put tobacco control in their agenda and adopted various measures in an effort to decrease smoking prevalence[8].

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[5] Ibid.

[6] Reubi/Berridge, pp. 460-466.

[7] See Chollat-Traquet C.: Tobacco or health: a WHO programme, European Journal of Cancer, 28 (2-3), 1992, pp. 311-315.

[8] WHO, Report on The Global Tobacco Epidemic (2009), available at: <https://www.who.int/tobacco/mpower/2009/en/>. (last accessed: 01.09.2019)

Even though the collective effort to take action against tobacco on both national and international levels were progressing by the 1990's, the tobacco epidemic was also on rise and eventually became the most serious public health problem. The numbers of smokers and other tobacco users among both the youth and adults were increasing. As the leading cause for premature death, tobacco use was accounted for 3,5 million deaths in 1992. It was estimated by the WHO that tobacco would cause more than 10 million deaths annually by 2030 if it was not contained[9].

Although numerous countries started having tobacco control measures in place, the regulations and norms varied among countries. Furthermore, there were still countries that lacked strong measures in force, or the capacity to implement them[10]. The severe effects of tobacco on the global scale created the need for a global response, as the domestic efforts proved insufficient.

Upon the recognition of the urgent need, the proposal of preparing an international treaty within this context started to gain broad support after a meeting held in 1993, which later set the foundations of the "Framework Convention on Tobacco Control" adopted by the WHA on 21 May 2003[11]. FCTC has been the most important turning point in the history of tobacco control. It provided a set of legal obligations for all member States to put into effect certain measures and further track the compliance of each State through

[9] WHO, History of World Health Organization Framework Convention on Tobacco Control, Geneva 2009, p. 1. ("History of the FCTC")

[10] Wipfli H. et al., Three Eras in Global Tobacco Control: How Global Governance Processes Influenced Online Tobacco Control Networking, Global Health Governance : The Scholarly Journal for the New Health Security Paradigm 10, no. 2, 2016: 138–50.

[11] Roemer R./Taylor A./Lariviere J.: Origins of the WHO Framework Convention on Tobacco Control, American Journal of Public Health 95, no. 6, June 2005, pp. 936-937.

the mechanisms provided under the treaty.

Besides the adoption of the FCTC, there were other important efforts on the international level concerning tobacco control as well. With the support of private philanthropic foundations taking action against tobacco, initiatives were established to enhance the global research and policy advocacy. The most significant of such initiatives was the "Bloomberg Initiative to Reduce Tobacco Use in Developing Countries" which still operates for the purpose of implementing tobacco control measures all around the world[12]. Throughout this period, an online network called GlobaLink was established which helped tobacco control network to advance their global cooperation with the help of technology[13].

Along with the growing evidence base concerning the hazardous effects of tobacco use, the tobacco control policies and efforts have developed as well. Due to several reasons, the tobacco epidemic has not been contained yet, although there has been significant progress as a result of increased awareness and global cooperation. Thus, enhancing certain tobacco control measures in order to make them more effective is required. The strengthening of the restrictions on tobacco packaging, and ultimately mandating plain packaging is a result of this need.

[12] Reubi/Berridge, p. 467.

[13] Wipfli et al., p. 4.

II. PLAIN PACKAGING AND ITS GENESIS

A. IMPORTANCE OF TOBACCO PACKAGING AND THE FIRST INTERVENTIONS

As part of the fight against tobacco, the countries have imposed many measures. Most common of them are bans on advertising and promotion, increased taxation and smoking bans in certain public areas. Despite such measures, desired outcomes were still far away as the trend in smoking rates kept on rising.

In the absence of the regular ways of promotion due to the increasing legal restrictions on advertisement and sponsorship, the importance of packaging and product design increased even more. This is because, in such cases, packaging has become one of the only revenues left for the tobacco companies to promote their brands and communicate with its customers. Particularly, in the so called "dark markets" where all tobacco advertising is completely forbidden, packaging is all that is left for them to promote their products[14].

Tobacco industry, therefore, has paid great attention to the packaging of its products through the features on them such as the brand logos, colours, fonts, graphics and the packaging materials[15]. It has been revealed that such features were being deliberately used by tobacco companies to appeal new or current consumers[16].

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[14] Freeman B./Chapman S./Rimmer M., The Case for the Plain Packaging of Tobacco Products, Addiction, Vol. 103, No. 4, 2007, pp. 580-590, p. 11.

[15] Freeman/Chapman/Rimmer, p. 7.

[16] Hammond D.: Standardized packaging of tobacco products: Evidence review, Prepared on behalf of the

Furthermore, the studies demonstrated that smokers associate themselves with the identity and personality of the brand image created by the features of tobacco packaging[17]. Since the consumers always carry the packs around with them after the purchase, the packs act as a "*mobile advertisement*" voluntarily displayed by the users, and the features of tobacco packaging plays a vital role in sustaining this brand imagery. Due to these reasons, packaging was determined as the next target for tobacco control, in an effort to decrease the demand for tobacco products.

Before plain packaging, the first interventions of governments to tobacco packaging actually started with mandatory textual and pictorial health warnings, which were also among the demand reduction measures implemented by the FCTC. Warnings placed on packaging were found to be a cost-effective way to directly inform the consumers about the risks they take by smoking[18]. Other than increasing the awareness on the hazards of smoking, using health warnings on the packaging, especially health warnings with graphic images, serves the purpose of curbing the attractiveness of the packaging and product design.

Irish Department of Health, March 2014, p. 23. ("Evidence Review")

[17] Wakefield M. A./Germain D./ Durkin S. J.: How Does Increasingly Plainer Cigarette Packaging Influence Adult Smokers' Perceptions about Brand Image? An Experimental Study, Tobacco Control 17, no. 6, 2008.

[18] Levy D.T. et al.: Public Health Benefits from Pictorial Health Warnings on US Cigarette Packs: A SimSmoke Simulation, Tobacco Control 26, no. 6, November 2017, pp. 649–655.

B. GENESIS OF PLAIN PACKAGING

In order to eliminate all the attractive features of tobacco packaging, the idea of mandating sales in plain packs emerged in the mid-1980's and has been proposed by various health groups. In 1986, as part of the tobacco control policies Canadian government carried out, the Canadian Medical Association first proposed plain packaging for cigarettes[19]. In 1989, "the Coalition Against Tobacco Advertising and Promotion" based in New Zealand proposed a complete ban on advertising, "*including the biggest advertising of all, the glamorous cigarette pack*[20]." Likewise, in its submission to the UK Government, "the Action on Smoking and Health" included uniform and plain packaging in its proposals in 1991[21]. In Australia, "The Center for Behavioral Research in Cancer" put forward the idea of "generic packaging" by recommending the Australian government that "*regulations be extended to cover the colours, design and wording of the entire exterior of the pack*" in 1992[22].

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[19] For a history of first proposals in Canada, New Zealand, Australia and UK; as well as how they were prevented by the efforts of the tobacco industry, see Physicians for a Smoke-Free Canada: Packaging Phoney Intellectual Property Claims, June 2009.

[20] Action on Smoking and Health, The Big Fight Begins, June 1989, available at: <https://www.industrydocuments.ucsf.edu/docs/#id=rhwv0205>. (last accessed: 01.09.2019)

[21] Action on Smoking and Health, Ending an Epidemic: A Manifesto for Tobacco Control, October 1991, available at: <https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/thhy0210>. (last accessed: 01.09.2019)

[22] Centre for Behavioral Research in Cancer: Ministerial Council on Drug Strategy (Australia), and Tobacco Task Force on Tobacco Health Warnings on Content Labelling, Health Warnings and Contents Labelling on Tobacco Products: Review, Research and Recommendations, Carlton South, Vic.: The Centre, 1992.

Even though the idea was seriously considered by some policy makers, none of the states managed to adopt plain packaging for a long time. This was mostly a result of the tobacco industry efforts aimed to dissuade governments. Canada became the first country where the idea of adopting plain packaging was seriously debated on the government level back in 1994. The efforts failed when the policymakers were convinced that such legislation would violate trademark rights of the tobacco companies[23]. Later on, few other countries put plain packaging policies on their agenda but failed to adopt it due to similar concerns. For example, the British Government tested the idea and decided not to adopt plain packaging due to concerns regarding the violation of trademark law and the free movement of goods within the EU under "the Treaty on the Functioning of the European Union"[24]. Uruguay introduced a legislation that limits packaging variations, so called "single presentation requirement", although it technically did not require packs to be plain[25].

The first country to introduce plain packaging was Australia. As mentioned above, the first recommendations concerning the said measure were made by "the Center for Behavioral Research in Cancer" in 1992. It was not until 2009 that a bill was proposed to

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[23] Excerpt of the Statement of the Minister of Health of Canada David Dingwall at the House of Commons of Canada, December 6, 1996, available at: <http://www.ourcommons.ca/Content/Archives/Committee/352/sant/evidence/25_96-12-06/sant25_blk-e.html>. (last accessed: 01.09.2019)

[24] Shmatenko L.: Regulatory Measures through Plain Packaging of Tobacco Products in the Light of International Trade Agreements, Czech Yearbook of International Law, vol. IV, 2013, Regulatory Measures and Foreign Trade, pp.27-46.

[25] See below § Ch. 2 (II).

the Australian Senate to introduce plain packaging legislation[26]. The bill was extensively debated in Australia and was contested through legal challenges[27]. In the end, plain packaging was fully put into effect by the end of 2012 in Australia[28].

After Australia became the pioneering state to successfully implement the measure in 2012, other countries have followed. Plain packaging legislations were enacted and fully implemented in, for instance, France, United Kingdom, New Zealand, Norway, Ireland and Turkey[29].

C. PURPOSES OF PLAIN PACKAGING

Tobacco control, as explained above, has been developed for the purpose of tackling the global tobacco epidemic that has been the cause of a significant amount of

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[26] Sen. Steve Fielding, Plain Tobacco Packaging (Removing Branding from Cigarette Packs) Bill (Aug. 20, 2009), available at <https://www.legislation.gov.au/Details/C2009B00165>. (last accessed: 01.09.2019)

[27] Chapman S./Freeman B: Removing the Emperor's Clothes: Australia and Tobacco Plain Packaging (Sydney University Press, 2014), available at: <https://ses.library.usyd.edu.au/handle/2123/12257> (last accessed: 01.09.2019), pp. 115-116.

[28] Tobacco Plain Packaging Act 2011, available at: <https://www.legislation.gov.au/Details/C2011A00148>. (last accessed: 01.09.2019)

[29] At the time of writing, other countries such as Burkina Faso, Canada, Georgia, Romania, Slovenia, Thailand, Hungary and Uruguay have enacted legislations and are expected to implement plain packaging. Many other governments also formally expressed their support for implementation of plain packaging and are expected to follow the others. See Canadian Cancer Society, Plain Packaging-International Overview, July 5 2019, available at <http://www.cancer.ca/~/media/cancer.ca/CW/get%20involved/take%20action/Tobacco%20control/plain-packaging-overview---2019-07-05.pdf?la=en>. (last accessed: 01.09.2019)

deaths around the world. All tobacco control policies have been developed in an effort to guard people from the hazards of tobacco use. In that respect, the main objective of tobacco control has been to "*reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke*[30]." All measures developed within the context of tobacco control aim to preserve public health by reaching the main objectives such as; ensuring the tobacco users to stop smoking, preventing people from taking up smoking and reduce the exposure to secondhand smoke[31]. In fact, it has been targeted by some governments to make their countries "*tobacco free*"[32].

Plain packaging was developed within this context, and therefore its main purpose is "to reduce the prevalence of tobacco use". On the other hand, it is a measure tailored

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[30] FCTC, art. 3.

[31] The objectives of the Australian Plain Packaging Act are described as follows:

"(a) to improve public health by:

(i) discouraging people from taking up smoking, or using tobacco products; and

(ii) encouraging people to give up smoking, and to stop using tobacco products; and

(iii) discouraging people who have given up smoking, or who have stopped using tobacco products, from relapsing; and

(iv) reducing people's exposure to smoke from tobacco products; and

(b) to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control.", Tobacco Plain Packaging Act 2011.

[32] See the Explanatory and Financial Memorandum for the Public Health (Standardised Packaging of Tobacco) Bill 2014 that states: "*Ireland's public health policy objective in relation to tobacco control is to promote and subsequently move toward a tobacco free society. Tobacco Free Ireland, the policy document approved by Government in July 2013, builds on existing tobacco control policies and legislation already in place in this country, and sets a target for Ireland to be tobacco free (i.e. with a prevalence rate of less than 5%) by 2025"*.

to serve a number of special purposes that would complement other measures in order to reach the main objective. These purposes can be found in the legislation enacted by the States which adopted plain packaging or in the supporting documents such as explanatory memorandums[33]. It is particularly important for the purposes and objectives of plain packaging to be clearly set out by the lawmakers, since they play a vital role in cases where the measure is legally challenged[34].

As the FCTC and the guidelines related to its relevant provisions highlight, all tobacco control measures have been determined taking into account the scientific data and previous experiences. Notably, the purposes that plain packaging purportedly serve have been supported by scientific evidence such as experimental studies.

1. Reducing the Attractiveness of Tobacco Products and Neutralizing Advertising Function of Packages

In most of the countries around the world, a young person has likely never seen an advertisement for a cigarette brand. This is because the ban on advertisement of tobacco products has been one of the widely implemented tobacco control policies since

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[33] See e.g. Tobacco Plain Packaging Act 2011; The Explanatory and Financial Memorandum for the Public Health (Standardised Packaging of Tobacco) Bill 2014; available at <http://social-sante.gouv.fr/IMG/pdf/250914_-_Dossier_de_Presse_-_PNRT_2_.pdf)> (last accessed: 01.09.2019). The stated purposes of the Australian legislation will be detailed below. See below § Ch. 2 (II, A)

[34] WHO: Plain Packaging of Tobacco Products: Evidence, Design and Implementation, available at: <http://www.who.int/tobacco/publications/industry/plain-packaging-tobacco-products/en/>. (last accessed: 01.09.2019)

the 1990's[35]. It is thus hard to imagine for someone young that any cigarette brand would appear in advertisements on television or billboards next to, for instance, a cereal brand or a beverage. However, before the bans on advertisement of tobacco products started to be implemented, advertisements were intensively used by the tobacco industry.

In fact, tobacco industry paid enormous attention to market their products to their potential customers through advertising. Undoubtedly, the vast majority of the potential customers of the tobacco industry have been comprised of young people. Tobacco industry indeed realized this fact and formulated a marketing strategy based on targeting young people.

In a study that systematically reviewed thousands of tobacco industry documents, it was revealed that industry, knowing that the youth constitute the biggest part of the starter smoker market, blatantly targeted marketing to minors and young people through a number of strategies that were developed to appeal them including advertising and promotion campaigns, pricing schemes, special product formulations and packaging designs[36].

As a way to protect youth from this tobacco industry tactic, advertising and sponsorship for the tobacco products have been banned in most of the countries that adopted tobacco control policies. Deprived of their strongest marketing instruments, the

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[35] Bans on tobacco advertising actually date back to 1960s in few countries such as New Zealand and UK. For a history of bans on tobacco advertising, see Liberman J. et al.: Plain Tobacco Packaging in Australia: The Historical and Social Context, in Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012, pp. 30-47, at pp. 40-41. Also see Hiilamo H./Glantz S.: FCTC Followed by Accelerated Implementation of Tobacco Advertising Bans, Tobacco Control 26, no. 4, 2017, p. 2.

[36] Cummings K. M. et al.: Marketing to America's Youth: Evidence from Corporate Documents, Tobacco Control 11, no. suppl. 1, 2002: i5–17.

leading companies in the tobacco industry realized that pack design will be the only thing that they can persist their brand imagery on[37]. So they shifted their attention to the packaging of their products, as a vehicle for appealing new or current customers, as the internal tobacco industry documents demonstrate[38]. To some extent, the loss of opportunity to communicate with the target groups through advertising and sponsorship in the restrictive countries would be recovered through the packaging of their products[39]. Tobacco companies thus invested heavily on their pack designs and came up with various new strategies to make them more appealing[40].

Tobacco packs serve its advertising functions both during and after the point when consumers purchase them. Unlike other types of products, tobacco packs are not disposed after they are first opened. They are rather retained by the consumers and displayed publicly whenever they are being used. Because of this high degree of visibility, tobacco products were described as "*badge products*"[41]. The users tend to associate themselves with the brand images reflected on the packs they carry and endorse that brand image to the others[42].

Packaging therefore functions as a form of advertising, particularly for the tobacco industry[43]. Plain packaging aims to restrict this function that is the only resort

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[37] M. Wakefield et al.: The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents, Tobacco Control 11, no. suppl. 1, 2002, i73–80. ("The Cigarette Pack as Image")

[38] Hammond, Evidence Review p.23.

[39] Hammond, Evidence Review, pp. 24-25.

[40] Freeman/Chapman/Rimmer, pp. 10–11.

[41] Wakefield et al., The Cigarette Pack as Image, p. 1.

[42] Ibid.

[43] WHO, Plain Packaging of Tobacco Products, p. 11.

left for the tobacco companies to communicate with its target groups where advertisement and sponsorship ban is implemented. It is also aimed to decrease the attractiveness of tobacco packs by removing all of its attractive features such as colour, shape and logos. A substantial amount of studies concerning plain packaging support that it would serve this purpose[44].

2. Reducing the Ability of the Packaging Techniques that Mislead Consumers About the Effects of Smoking

Today, almost all of the cigarettes sold in the market are manufactured with filters. These filters are supposed to reduce the exposure of unhealthy constituents while smoking, mainly tar and nicotine. In most countries, consumers can see the amount of harmful ingredients that they are exposed to when they smoke a cigarette on the packs they purchase[45]. In addition to filtering, manufacturers use certain techniques to manufacture products that yield different amounts of said constituents. In this way, tobacco companies can market a wide range of product types differing on the yield of unhealthy constituents with different labels and packaging depending on how *heavy* or *light* is the product. Consumers can therefore choose to smoke a cigarette that yields lower amounts of unhealthy constituents.

However, the tobacco market was not always comprised of filtered and lower-yield products. Until the early 1950's, the average sales weighted yields were approximately 30 mg tar and 2 mg nicotine in the UK, which are extremely high numbers

[44] Ibid.

[45] The main ingredients are namely tar, nicotine and carbon-monoxide.

considering the average numbers today[46].

The marketing of filtered cigarettes began in the early 1950's, as the worrisome scientific evidence concerning the deadly effects of smoking started to emerge[47]. Filtered cigarettes were promoted by the tobacco companies as a scientific breakthrough that would enable smokers to keep smoking with less worries on the risks that they take. In fact, concurrent with the increase in the market share of filtered cigarettes, the average tar and nicotine levels began to decline[48]. In the 1960's and 1970's, the tar and nicotine levels dropped further, as major modifications in the cigarette design were made by the manufacturers[49]. The average sales-weighted yields were found to be around 16 mg tar and 1.3 nicotine by 1979 in the UK. According to this study, over the period between 1934 and 1979, the average tar yield decreased by 49% and the nicotine yield by 31%[50].

As the health concerns related to smoking increased among the public, the cigarette companies have intensively promoted filtered and lower-yield products, as a way to reassure the consumers that there are relatively healthier products. According to the disclosed industry documents, tobacco companies used various tactics to create the perception that some products are healthier[51]. One of the most commonly used and

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[46] Jarvis M. J.: Trends in Sales Weighted Tar, Nicotine, and Carbon Monoxide Yields of UK Cigarettes, Thorax 56, no. 12, 2001, pp. 960–63,

[47] National Cancer Institute: Monograph 7: The FTC Cigarette Test Method for Detemining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes, Foreword, available at: <https://cancercontrol.cancer.gov/brp/tcrb/monographs/7/index.html.>. (last accessed: 01.09.2019)

[48] Monograph 7, foreword, p. iv

[49] Ibid.

[50] Jarvis.

[51] National Cancer Institute: Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-

effective tactics is to designate virtuous brand names and descriptors such as “Light”, “Ultra-Light”, “Super-Light” or “Mild”. Lower-yield products with such designated brands were heavily advertised as safer options and an alternative to quitting for health-conscious smokers. Review of industry documents reveal that marketing of such products was a deliberate plan of the industry aimed to maintain its consumer base in face of increasing health concerns in relation to smoking.

Even though the decrease in tar and nicotine levels in cigarettes with filtering and other cigarette design modifications seems like a benefit to public health, the truth was different. The scientific studies reveal that use of lower-yield cigarettes has not significantly decreased the health risks related to smoking; and that the benefits of using lower-yield products are minimal compared to a complete cessation. In fact, it has been found that, switching to lower-yield cigarettes ultimately even increased the number of lung cancer patients among long-term smokers[52]. One of the reasons underlying this fact is that the actual amount of tar and nicotine intake of a smoker who switched to lower-yield cigarettes may be the same as, or even more than, his previously used higher yield cigarettes[53]. This is because the smokers tend to regulate how they smoke in order to get as much nicotine as they need in order to sustain their addiction. For that purpose, they unwittingly smoke more intensively or frequently.

Consequent to the above-mentioned findings, the perception created by the lower-yield cigarettes that they are less hazardous is false. In the absence of any significant

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Measured Yields of Tar and Nicotine, available at < https://cancercontrol.cancer.gov/brp/tcrb/monographs/13/> (last accessed: 01.09.2019), p. 231.

[52] “Monograph 13, p. ii.

[53] Ibid.

difference in health risks when smoking lower-yield cigarettes, switching cigarettes instead of giving up smoking is not recommendable in the public health perspective, because it causes more harm by leading the consumer to believe that there is a viable alternative to smoking cessation.

As a result of this false marketing, the total cigarette sales which had begun to decline after the first public statements about links between smoking and lung cancer in the early 1950's, turned back to its increasing course[54]. It apparently reassured the consumers that the lower-yield cigarettes are healthier, leading many concerned smokers to switch cigarettes instead of trying to quit smoking[55].

Therefore, the false message fostered by tobacco companies through marketing these cigarettes are deceptive and misleading for the consumers. In that vein, descriptors that may mislead people about the health risks of using other tobacco products such as "light" or "mild" were banned in many countries as part of tobacco control.

Despite the bans on misleading descriptors, the public misperceptions on the lower-yield cigarettes persisted, as the surveys made in the countries where the bans have been in force found[56]. It's partly due to the fact that such misperceptions have been held by the public for decades. On the other hand, the brand names such as "light" were not the only feature that derived misperceptions about lower-yield cigarettes. It has been

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[54] Monograph 7, foreword, p. iv.

[55] Gilpin E.A. et al.: Does Tobacco Industry Marketing of 'light' Cigarettes Give Smokers a Rationale for Postponing Quitting?, Nicotine & Tobacco Research: Official Journal of the Society for Research on Nicotine and Tobacco 4 Suppl. 2, 2002, pp. 147-155.

[56] Borland R. et al.: What Happened to Smokers' Beliefs about Light Cigarettes When 'Light/Mild' Brand Descriptors Were Banned in the UK? Findings from the International Tobacco Control (ITC) Four Country Survey, Tobacco Control 17, no. 4, 2008, pp. 256–62.

found that consumers' perceptions were also affected by the packaging, and in particular colour of different brand variants[57]. So after the descriptors were removed, the common perception persisted as the lighter colours have been associated with lower-yield products, and darker colours were associated with higher-yield products. The tobacco industry has also played a role in this by replacing the prohibited descriptive terms with colour terms such as *red, gold* or *silver*[58].

As most of the consumers still had false beliefs concerning the risks associated with lower-yield cigarettes in the absence of descriptors, it has been recommended by the public health experts to further extend the efforts to correct such misperceptions. As such, adoption of plain packaging was claimed to be an effective way which was also supported by a number of experimental studies and surveys[59]. In light of these evidence, there is a

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[57] See e.g.: Peace J. et. al.: Colouring of cigarette packs in New Zealand, does it mislead customers? University of Otago, Health Promotion and Policy Research Unit, 2007; Moodie C./Ford A.: Young adult smokers' perceptions of cigarette pack innovation, pack colour and plain packaging. Australasian Marketing Journal 2011, 3:174-80.; Moodie C./Ford A./Mackintosh A.M./Hastings G.: Young people's perceptions of cigarette packaging and plain packaging: an online survey, Nicotine Tob Res 2012; 14(1):98-105.

[58] Alpert H.R./Carpenter D./Connolly G.N.: Tobacco Industry Response to a Ban on Lights Descriptors on Cigarette Packaging and Population Outcomes, Tobacco Control 27, no. 4, 2018, pp. 390–98.

[59] See e.g.: Wakefield/Germain/Durkin; White C.M./Hammond D./Thrasher J.F./Fong G.T.: The potential impact of plain packaging of cigarette products among Brazilian young women: an experimental study, BMC Public Health, 2012, pp. 737–747.; Wakefield M.A./Hayes L./Durkin S./Borland R.: Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study. BMJ Open, 2013; Gallopel-Morvan K./ Moodie C./Hammond C./Eker F./Beguinot E./Martinet Y.: Consumer perceptions of cigarette pack design in France: a comparison of regular, limited edition and plain packaging, Tobacco Control, 2012, pp. 502-506.; Hammond D./Dockrell M./Arnott D./Lee A./McNeill A.: Cigarette pack

solid indication that plain packaging is apt to decrease the false misperceptions concerning the health effects of tobacco products.

3. Increasing the Effectiveness and Visibility of Health Warnings

The use of health warnings on packaging is one of the tobacco demand reduction measures that have been most commonly used by governments. Through these messages, it is sought to expand awareness of public regarding the hazards of tobacco use and discourage tobacco consumption.

First use of health warnings date back to 1960's when governments started to require certain textual warning labels on the side of tobacco packs[60]. Despite tobacco industry attempts against the diffusion of the health warnings requirement, a vast majority of the governments have adopted this requirement in the course of time[61]. The health warnings used in different countries vary in certain aspects, such as the strength of the warnings, their positioning and size on the packaging[62].

The health warnings have found to be a cost-efficient and sustainable tobacco demand reduction measure. In the countries that implemented the measure, it was

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design and perceptions of risk among UK adults and youth, European Journal of Public Health, 2009, 19(6), pp. 631–637; Moodie C./Ford A.: Young adult smokers' perceptions of cigarette pack innovation, pack colour and plain packaging. Australasian Marketing Journal 2011, 3:174-80.

[60] Hiilamo H./Crosbie E./Glantz S.: The Evolution of Health Warning Labels on Cigarette Packs: The Role of Precedents, and Tobacco Industry Strategies to Block Diffusion, Tobacco Control 23(1), 2014 January.

[61] Aftab M./Kolben D./Lurie P.: International Cigarette Labelling Practices, Tobacco Control 8(4), December 1, 1999, pp. 368–72.

[62] Ibid.

observed that the general perceptions and awareness on the hazards of tobacco use has improved[63]. The experimental studies have also shown that the effectiveness of the health warnings increase as warnings got bigger and included pictures[64]. In an effort to strengthen the health warnings, a number of countries took notice of such studies and started mandating pictures and enlarging the size of the warnings[65].

One of the main reasons why the efficiency of health warnings has come into question is that the warning labels were being undermined by other elements of tobacco packaging. For example, branding and colour used on the packaging can catch the viewer's attention more than the health warnings. Some experimental studies indicate that the association between the branding and smokers are mostly maintained even when large pictorial warnings are used[66]. Standardizing packaging of tobacco products would therefore eliminate such elements that undermine the noticeability and efficiency of the warnings.

The idea that the measure enhances the effectiveness of warnings placed on packs are supported by numerous scientific evidence as well. Studies suggest that warnings placed on plain packs are more recognizable and have a higher rate of recall among consumers, particularly among young non-smokers[67].

On the other hand, a few studies have found that the smokers' tendency to avoid

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[63] Hammond D.: Health Warning Messages on Tobacco Products: A Review, Tobacco Control 20(5), September 2011, p.329. ("Health Warning Messages")

[64] Ibid.

[65] See Hiilamo/Crosbie/Glantz.

[66] Hammond, Evidence Review, p.11.

[67] Hammond, Evidence Review, pp.10-11.

health warnings persist regardless of the removal of branding and there were no significant difference in their perceptions of plain packs and ordinary packs with brands[68].

Nevertheless, under the findings of various studies that surveyed the impact of health warnings and plain packaging, it is arguable that these two measures have independent effects on reducing the demand for tobacco by eliminating the appealing features of packaging and informing the consumers of health risks[69]. In this respect, they can interactively complement each other.

III. WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL

A. IN GENERAL

The first idea of making an international treaty concerning tobacco control dates back to 1979. "WHO Expert Committee on Smoking Control" suggested that the WHA

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[68] Maynard O.M. et al.: Avoidance of Cigarette Pack Health Warnings among Regular Cigarette Smokers, Drug and Alcohol Dependence 136, 2014, pp. 170–74; Also see Moodie/Ford.

[69] Hoek J. et al., Effects of Dissuasive Packaging on Young Adult Smokers, Tobacco Control 20 (3), 2011, pp. 183–88; Wakefield M. et al.: Do Larger Pictorial Health Warnings Diminish the Need for Plain Packaging of Cigarettes?, Addiction (Abingdon, England) 107 (6), 2012, pp. 1159–1167; Germain D./Wakefield M.A./ Durkin S.J.: Adolescents' Perceptions of Cigarette Brand Image: Does Plain Packaging Make a Difference?, The Journal of Adolescent Health: Official Publication of the Society for Adolescent Medicine 46 (4), 2010, pp. 385–92; Hammond D. et al.: The Perceptions of UK Youth of Branded and Standardized, 'plain' Cigarette Packaging, European Journal of Public Health 24 (4), 2014, pp. 537–43; Mays D. et al.: Cigarette Packaging and Health Warnings: The Impact of Plain Packaging and Message Framing on Young Smokers, Tobacco Control 24 (1), 2015, pp. 87–92.

should take account of its treaty making powers by virtue of article 19 of the Constitution of WHO, in case the tobacco control program it outlined did not produce the expected results in a reasonable time[70]. This idea was further elaborated on in 1989, when V.S. Mihajlov published an article in which he advocated that international legal frameworks should be developed in order to fight public health problems such as tobacco use[71].

In 1993, the idea of using WHO's treaty making power to found an international legal framework for tobacco control was voiced by Ruth Roamer[72]. This time, the idea gained a wide support and the WHA called for the preparation of a treaty for tobacco control in 1996[73]. Subsequently, by the resolution of the WHA, a working group was established to draw up the provisional texts of the treaty and started working in 1999[74]. With the same resolution, an intergovernmental negotiating body ("INB") was founded by the WHA which started the negotiations after the provisional texts were accepted in 2000[75]. The INB delivered the final draft of the Convention to the WHA in March 2003 and the final text was adopted by the 56th WHA on 21 May 2003.

A body comprised of all Parties called the "Conference of the Parties" (COP) was

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[70] WHO Expert Committee on Smoking Control and World Health Organization: Controlling the Smoking Epidemic : Report of the WHO Expert Committee on Smoking Control, Meeting Held in Geneva from 23 to 28 October 1978, Geneva 1979, pp. 64-65, available at: <https://apps.who.int/iris/handle/10665/41351>. (last accessed: 01.09.2019)

[71] Mihajlov V.S.: International Health Law: Current Status and Future Prospects, 1989, International Digest of Health Legislation 40 (9).

[72] Roemer/Taylor/Lariviere, p. 936; see also History of the FCTC p. 3.

[73] Resolution WHA 49.17, 25 May 1996.

[74] Resolution WHA 52.18, 24 May 1999.

[75] Resolution WHA 53.16, 20 May 2000.

established to govern the implementation of the FCTC. This governing body has adopted guidelines for implementation of specific provisions under the FCTC through a consultative and intergovernmental process seeking the effective implementation of legal obligations enshrined in the treaty[76]. COP has further negotiated and adopted "the Protocol to Eliminate Illicit Trade in Tobacco Products" in 2012, which is an individual treaty in its own right[77].

1. Significance of the FCTC

Although increasing awareness with regards to the impact of tobacco use was leading to global action, there were no binding instruments for nations to follow. WHO had been the leading global force that was guiding the national and international actions against tobacco. However, the guidance provided by WHO were only served as recommendations for the member states. In that vein, the FCTC has been the pioneering instrument that obliged governments to adopt public health legislation and policies.

The WHO had treaty-making powers vested in its Constitution[78]. Even though the Organization had a long history, the FCTC became the first international treaty that was prepared based on this powers. This fact demonstrates the improving global cooperation and the will to take substantive actions against the tobacco epidemic. The main objective

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[76] WHO, Guidelines for implementation of the WHO FCTC (2013), available at: <https://www.who.int/fctc/treaty_instruments/adopted/guidel_2011/en/>. (last accessed: 01.09.2019)

[77] WHO, Protocol to Eliminate Illicit Trade in Tobacco Products, available at: <https://www.who.int/fctc/protocol/illicit_trade/protocol-publication/en/>.(last accessed: 01.09.2019)

[78] Constitution of the World Health Organization, Article 19.

of the convention, which was "*to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke*"[79], has been considerable enough for the Parties to draft such an agreement under the auspices of the WHO.

As evident by its name, the FCTC was prepared in a "framework convention" approach. The term is generally used to describe "a variety of international agreements whose principal function is to establish a general system of governance for an issue area, and not detailed obligations[80]". With this approach, firstly a framework of governing principles based on the main objectives acknowledged by the Parties is adopted, and then separate binding agreements or protocols supplementing the framework agreement on specific issues are adopted. However, the FCTC has become more than an agreement that provided a general system of governance, but also contained a number of substantive provisions that obliged adoption of certain measures[81]. The structure of the FCTC can be summarized as "*two pillars and one roof*", comprised of national implementation of substantive provisions and international cooperation as two pillars; and the monitoring mechanism being the roof[82].

Even during the course of negotiations, a number of States started taking

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[79] FCTC, art. 3

[80] Bodansky D./WHO Tobacco Free Initiative: The Framework Convention/Protocol Approach, 1999, available at: <https://apps.who.int/iris/handle/10665/65355>. (last accessed: 01.09.2019)

[81] Liberman J.: The Power of the WHO FCTC: Understanding Its Legal Status and Weight, The Global Tobacco Epidemic and the Law, UK 2014, p. 3.

[82] See generally Lo C.: Establishing Global Governance in the Implementation of FCTC - Some Reflections on the Current Two-Pillar and One-Roof Framework, Asian Journal of WTO & International Health Law and Policy 1 (2), pp. 569-587, 2006.

legislative and policy actions that were in line with the obligations that later became part of the FCTC[83]. The fact that the States began introducing laws and policies nationally even before they were formally committed to do so, demonstrates the effectiveness of the negotiations concerning the FCTC alone[84]. It also demonstrates the global commitment to take immediate and strong actions against the tobacco epidemic.

Once the FCTC became effective, the global commitment to tobacco control turned into a set of legal obligations enshrined in an international treaty. As of July 2017, 181 parties have ratified the FCTC, which makes it one of the most widely adopted multilateral treaties[85]. So, a number of states formally committed to the global agenda on tobacco control through a binding international legal instrument. Even though it is a framework convention, it contains many specific obligations that Parties undertake. According to the progress reports, such legal obligations have been very effective in the national level. After ratifying the FCTC, the majority of the Parties either adopted new legislation concerning tobacco control or strengthened their existing laws[86].

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[83] For the examples of national and subnational tobacco control policies developed in parallel with negotiations, see History of the FCTC, p. 19. Also see:

Lannan K.: The WHO Framework Convention on Tobacco Control: The International Context for Plain Packaging, in Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012, pp. 11-28.

[85] For the list of signatories to the FCTC, see: Framework Convention Alliance, Parties to the WHO FCTC (ratifications and accessions) available at <https://www.fctc.org/parties-ratifications-and-accessions-latest/>. (last accessed: 01.09.2019)

[86] WHO, 2018 Global progress report on implementation of the WHO Framework Convention on Tobacco Control, available at: <https://www.who.int/fctc/reporting/summary_analysis/en/>. (last accessed: 01.09.2019)

The importance of the FCTC, particularly in the context of this study, arise out of the legal challenges that are frequently mounted against tobacco control measures in a number of ways. FCTC, along with the protocols and guidelines developed under it, can play a vital role in such cases by supporting the defendants[87]. For one, it functions as the legal basis for the measures adopted by the member States, as it is an international treaty with a binding nature. The wide adoption of the Convention also demonstrates that the measures enshrined in the FCTC are accepted through international consensus.

FCTC can also demonstrate the interest and rights of the countries in governing the measures that can potentially breach certain rights or freedoms of the claimants. When countering such claims, the FCTC's objectives to protect fundamental rights to health, life or healthy environment can support the Parties, as they demonstrate that the measures are adopted in the name of promoting public health and constitutional rights. In that way, it supports the justification of the Parties' claims that they have the power to impose such measures.

Furthermore, frequently highlighted feature of the FCTC and its guidelines being "*evidence-based*" provides an evidentiary support with regards to the necessity and efficiency of the measures[88]. The fact that it was based on the best practices and the experience of parties as well as the scientific evidence, strengthens the basis of the measures. Within this context, it serves a significant function in the justification of the

[87] Zhou S.Y./Liberman J. /Ricafort E.: The Impact of the WHO Framework Convention on Tobacco Control in Defending Legal Challenges to Tobacco Control Measures, Tobacco Control 28, no. Suppl. 2, 2019, pp. 113–118.

[88] See Taylor A.L./Bettcher, D.W.: WHO Framework Convention on Tobacco Control: a global "good" for public health, Bulletin of the World Health Organization, 78 (7) , 2000, pp. 920 - 929.

limitations imposed on the exercise of commercial rights and interests by demonstrating that a measure is reasonable or proportionate.

2. Other Instruments Adopted under the FCTC

As noted above, being a framework convention, FCTC mostly includes broad obligations that form a general system of governance. It was aimed to consummate the provisions of the Convention with the adoption of additional instruments through negotiation. The COP is the organ responsible for the development of such instruments. Within that context, through an intergovernmental process, the COP has developed guidelines for implementation of a series of substantive provisions of the FCTC, in order to guide the Parties in effectively implementing the key provisions enshrined in the framework[89].

More recently, "the Protocol to Eliminate Illicit Trade in Tobacco Products" was drawn up with the aim of preventing the increasing illicit trade activities which undermines tobacco control policies by providing access to cheaper tobacco products[90]. The protocol was built upon article 15 of the FCTC, which prescribes eradication of illicit trade in tobacco products. By means of allowing for the rapid adoption of other instruments, the provisions under the FCTC has been developed further. In that way, as well as enhancing the international framework, it has promoted the implementation of the

[89] Guidelines for implementation of the WHO Framework Convention on Tobacco Control. Available at <https://www.who.int/fctc/treaty_instruments/adopted/en/>. (last accessed: 01.09.2019)

[90] Protocol to Eliminate Illicit Trade in Tobacco Products. Available at <https://www.who.int/fctc/protocol/illicit_trade/protocol-publication/en/>. (last accessed: 01.09.2019)

provisions under the FCTC on national level.

B. PLAIN PACKAGING IN FCTC

1. In General

The main objective of the WHO FCTC, as described in its text, is:

"to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke[91]*."*

As previously noted, FCTC contains a framework of tobacco control measures aimed to provide the Parties with sufficient tools to accomplish this objective. While some of the measures enshrined in the Convention are non-binding and can be considered only as encouragements, some of the measures are binding on the Parties.

Pursuant to Art. 7, the Parties are obliged to "adopt and implement effective legislative, executive, administrative or other measures necessary to implement their obligations" set out in the substantive provisions within the Articles 8 to 13 which contain non-price measures that were aimed to decrease demand. Art. 7 further provides for the adoption of guidelines related to the said Articles by the COP. By doing so, Art. 7 demonstrates how the WHO attaches importance to demand reduction measures in

[91] FCTC, art. 3

dealing with addictive substances[92].

Among the mentioned substantive provisions that are binding on the Parties, the obligations provided in Art. 11 and Art. 13, besides the guidelines related to these articles are the sources of plain packaging within the context of the FCTC.

2. Article 11 on Packaging and Labelling

Art. 11 concerns packaging and labelling, which are among the most important elements of tobacco products. Under this article, the Parties are committed put into effect effective measures with regards to tobacco packs and labelling within three years.

Under Art. 11, the Parties undertake to adopt two types of demand reduction measures. One of them is to prevent "false or misleading packaging and labelling", and the other one is to require all tobacco products to carry health warnings and messages, along with information on "relevant constituents and emissions of tobacco products".

a. Restriction of False or Misleading Tobacco Packaging and Labelling

The first part of the measures, as provided by Art. 11(1)(a), concerns restrictions aimed to prevent the tobacco packaging and labelling from having a misleading or deceptive effect on the customers. For this purpose, the Parties must ensure that "*tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions*".

[92] Lannan, p. 16.

It is further required that the packaging and labelling do not "create the false impression that a particular tobacco product is less harmful than other tobacco products". The terms "low tar", "light", "ultra-light", or "mild"" are provided within this article as examples of the misleading terms commonly used on the tobacco products. In this way, one of the purposes of plain packaging, which is to prevent some features of packs and labels from creating the perception that a product is not harmful or comparably healthier than others, is targeted by the Art. 11[93].

b. Requirement of Health Warnings and Messages

The second part of the measures are comprised of requirements aimed to make sure that all tobacco products bear warnings and messages emphasizing the striking hazards of tobacco use. As noted earlier, using warnings and messages is a cost-efficient way to communicate with the public inform people on the harms" of tobacco use[94]. It has therefore been one of the most widely adopted demand reduction measures in tobacco control. The obligation to adopt and implement this measure was undertaken by the Parties as specified under Art. 11(1)(b). It is further required under Art. 11(2) that "*packaging and labelling of all tobacco products shall provide information on constituents and emissions of the products*".

[93] See above § Ch. 1 (II)(C)(2).

[94] "Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control", Decision of COP3, FCTC/COP3(10), 22 November 2008, para. 3; Hammond, Health Warning Messages; See above § Ch. 1 (II)(C)(3).

3. Guidelines for Implementation of Article 11

Under the first paragraph of the Art. 11, the purpose of the guidelines is described as "*to assist Parties in meeting their obligations under Art. 11 of the Convention, and to propose measures that Parties can use to increase the effectiveness of their packaging and labelling measures*"[95]. In consideration of this purpose, the guidelines for the implementation of Art. 11 contain specific guidance for the Parties on the elements of warnings and messages to be used on packaging and labelling such as location, size, use of pictorials, colour, rotation and content, as well as recommendations on the process for developing effective measures as required by Art.11.

The key part of the afore-mentioned purpose of the guidelines with regards to plain packaging is to advance the efficiency of the relevant measures. In addition to the mentioned purpose stated under paragraph 1, the objective of the guidelines that proposes adoption of measures further than what the substantive provisions of the Convention obliges can be seen in paragraph 3 as well. It is stated that: "Effective health warnings and messages and other tobacco product packaging and labelling measures are key components of a comprehensive, integrated approach to tobacco control.[96]" This statement reflects the fact that the success of the tobacco control measures increase when they are complemented with further measures. It therefore stresses the importance of employing a comprehensive and integrated approach when adopting the binding

[95] "Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control", Decision of COP3, FCTC/COP3(10), 22 November 2008.

[96] Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control, para. 3

obligations under the FCTC.

An example of the foregoing approach can be found under para. 12 of the Guidelines which recommends the Parties to use warnings and messages that take up as much of the principal display area as possible. The minimum standard required by the Art. 11 is that the warnings and messages must cover "no less than 30% of the principal display areas". Based upon the scientific data that the efficiency of the warnings and messages increase with their proportions, it is thus proposed by the Guidelines to cover as large area as possible in order to increase its effectiveness.

The recommendation for plain packaging was incorporated in the Guidelines with a similar motive. Under para. 46 of the Guidelines titled "*Plain packaging*", Parties are recommended to adopt measures "*to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging).*[97]"

The rationale for plain packaging is stipulated in the following sentence. It is set forth that plain packaging may "*increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others*." In consideration of this statement, it is implied that plain packaging can increase the effectiveness of both types of measures set out under Article 11, namely to restrict the misleading or deceptive packs and labels, and to require health warnings and messages.

All in all, adoption of plain packaging is recommended by the guidelines for the

[97] Guidelines for Implementation of Article 11 of the WHO Framework Convention on Tobacco Control", para. 46

implementation of Art. 11 because it is claimed to be complementary for the effectiveness of both of the above mentioned measures provided under Art. 11. The basis of this recommendation lies in the evidence-based purposes of plain packaging: it eliminates packaging and labelling techniques deliberately used by the tobacco industry to convince the consumers that they have healthier options, and it increases the efficiency of warnings and messages[98].

4. Article 13 on Advertising Promotion and Sponsorship Bans

Art. 13 obliges Parties to put into effect a "comprehensive ban on tobacco advertising, promotion and sponsorship". The use of the term "comprehensive ban" is reflected in the obligations listed under the fourth paragraph, as they are written in a very strong language that tries to cover all forms of advertising, promotion and sponsorship.

When read together with the description of the term "tobacco advertising and promotion" under Art. 1(c), the obligation is very comprehensive in terms of what can fall under this provision indeed. As per the definition, "any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly" is classified as advertising and/or promotion.

Whereas paragraph 4 obliges Parties to adopt comprehensive measures to prohibit advertising, promotion and sponsorship, paragraph 5 further encourages Parties to adopt measures "beyond the requirements specified in paragraph 4".

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[98] See above § Ch. 1 (II)(C)(3).

5. Guidelines for Implementation of Article 13

The purpose of the guidelines, as stated under the first paragraph, is "to assist Parties in meeting their obligations under Art. 13 of the FCTC". It is stressed that they are drafted in consideration of "the evidence and the experience of the Parties" that have successfully contained tobacco advertising, promotion and sponsorship.

As mentioned earlier, the Guidelines for Implementation of Art. 11 addresses plain packaging in connection with the health warnings. Similarly, the Guidelines for Implementation of Art. 13 addresses plain packaging under the title "Packaging and product features", and refers to those guidelines. This is an example of how coexisting tobacco control strategies can complement each other.

As in the case with Art. 11, the guidelines recommend implementation of plain packaging within the scope of the substantive provision under Art. 13. According to the guidelines, any features inherent in regular tobacco packaging, such as brand logo, colours, fonts, pictures, shapes and materials cultivate and promote brand identity. These are thus used to attract the consumers, which is what advertising and promotions do.

Even though the experimental studies and other evidence that indicates how effectively tobacco companies can use the packaging and product design to attract the consumers are not referenced in the guidelines, those are clearly the sources of this assertion. This is particularly the case when regular forms of marketing are denied to the tobacco industry because of the bans. In such cases, packaging and product design are the few remaining tools for the tobacco companies to attract the customers[99]. It is evident that the guidelines were thoughtfully prepared in an effort to extend the ban to cover such

[99] Wakefield et. al.; Hammond, Evidence Review; also see above § Ch. 1 (II)(C)(1).

remaining tools, in accordance with the term "comprehensive ban".

This attitude can be seen on the other topics addressed by the guidelines as well. For instance, the terms "*brand stretching*" and "*brand sharing*" are defined in the guidelines and are acknowledged as tobacco advertising and promotion "*in so far as they have the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly*". Even though they are indirect methods of cultivating brands which can be used in the course of trade, they were included in the scope of the bans in a strict sense of preventing any negative effects on tobacco use.

Recommendation of mandating plain packs were made in the guidelines on the ground that features of packs and products itself were used as means of advertising and promotion in the tobacco market. In other words, the features used on a regular packaging are included in the comprehensive ban as mandated by the Art. 13 as per the guidelines, and thus plain packaging, which is devoid of all of these features, must be implemented in accordance with the binding obligation under the Art. 13[100].

In this way, plain packaging's purpose of reducing the attractiveness of tobacco products and neutralizing advertising and promoting functions of the packages, is accepted as a complimentary requirement within the scope of bans on advertising and promotion by the guidelines.

[100] The features of tobacco products and their packaging that were to be removed are features such as: logo, colours, fonts, pictures, shapes and materials.

§ CHAPTER TWO

OVERVIEW OF LEGAL DISPUTES CONCERNING PLAIN PACKAGING LEGISLATIONS OF CERTAIN COUNTRIES

I. INTRODUCTION

As mentioned earlier, the idea of mandating plain packaging started to be seriously considered in various countries, particularly after the adoption of FCTC and its relevant guidelines that recommend it. Although tobacco control measures imposed increasing restrictions on tobacco industry over the years, one may argue that plain packaging was the final straw for the industry, since it deprived them of using their IP rights on packaging which was the final frontier they use to communicate with customers for the purposes of promotion and advertisement. Members of the tobacco industry, therefore, raised many arguments against legitimacy of plain packaging in an effort to dissuade governments from implementing it. Some of the legal arguments against the compatibility of plain packaging with laws were in fact plausible and casted doubts on its implementation.

For one, certain rights of private parties including IP rights are directly affected by plain packaging, because it annihilates the freedom of tobacco companies to design the packaging and appearance of their products. In that way, the right owners lose the utility and value of their IP assets, and particularly their trademarks which are protected under the domestic laws of most jurisdictions as well as international trade agreements. The balance between a state's discretion in regulating for the public interest and the preservation of private parties' IP rights thus came into question with Australia's move to enacts the world's first plain packaging legislation.

Tobacco industry was expected to pursue all legal remedies against plain packaging laws in any forum possible. International investment treaties that allow an investor to file arbitration claims against a host state poses a threat of having to pay large amounts of compensations to tobacco companies. Furthermore, WTO's dispute settlement mechanism allows for member states to file complaints concerning regulations of another member. Availability of such fora that would be likely used against plain packaging laws created a so called "*chilling effect*" on most governments[101]. In that vein, the outcomes of the legal challenges mounted against Australia were highly anticipated because they would be decisive in the successful implementation of the subject measure, which would establish a precedent for other states that were considering adopting similar regulations.

In this chapter, we will discuss the legal challenges mounted against plain packaging legislations on three different routes. For the purposes of this thesis, the core legislation will be the legislation of Australia which introduced world's first plain packaging regulations. Before reviewing the legal challenges, the Australian legislation and how it regulates the packaging of tobacco products will be briefly summarized. Then, we will discuss three separate legal challenges. The first one is the constitutional challenge filed in the High Court of Australia under a provision of the Commonwealth Constitution which allows the government to acquire property only upon payment of just terms. The second one is an international arbitration dispute filed against Australia under a bilateral investment treaty. The third one is the dispute commenced at the WTO under

[101] For a study on how the threat of investment treaty arbitration impact state policies, see Tienhaara K.: Regulatory Chill and The Threat of Arbitration: A View from Political Science., In Brown C./Miles K. (Eds.), Evolution in Investment Treaty Law and Arbitration, pp. 606-628, Cambridge 2011.

the WTO agreements that Australia is a party.

Since the arbitral tribunal commenced against Australia did not exercise jurisdiction over the dispute, the claims were not examined on their merits. Hence, the decision of the tribunal did not incur any indications for potential investment treaty disputes in relation to plain packaging legislations. Nevertheless, a similar investment treaty dispute filed against Uruguay might provide implications, because it concerns regulations that impose restrictions on tobacco packaging, even though they were not as restrictive as plain packaging. We will, therefore, finally discuss the arbitration case filed against Uruguay and the findings of the arbitral tribunal related to the tobacco companies' claims[102].

II. AUSTRALIA

A. AUSTRALIAN LEGISLATION

As part of a comprehensive strategy aimed at reducing smoking rates in Australia, including tax increases, social campaigns and ban of tobacco advertising on the internet, the Australian Government announced in April 2010 that it will introduce a legislation that mandates plain packs for tobacco products. Consequently, "The Tobacco Plain

[102] It should be noted that several national legislations of the states that adopted plain packaging after Australia, such as the UK, Ireland and France, were challenged by the tobacco companies without success as well. For an overview of the legal challenges, see Tobacco Free Kids, Summaries of the Legal Challenges, available at <https://www.tobaccofreekids.org/plainpackaging/tools-resources/legal/case-summaries>. (last accessed 30.12.2019)

Packaging Act (Cth) (TPP Act)" was enacted on 21 November 2011[103]. Under the TPP Act, "Tobacco Plain Packaging Regulations 2011", as later amended by the "Tobacco Plain Packaging Amendment Regulations 2012 (No. 1) (Cth) (TPP Regulations)" which prescribed implementing regulations was promulgated[104]. In addition, Trade Marks Act 1995 was amended for the purposes of integration of the TPP Act with the trademark legislation[105]. The mentioned laws jointly constitute the Australian Plain Packaging scheme which introduced certain requirements concerning tobacco product packaging; and obliged all products sold at retail outlets to comply with the requirements as of 1 December 2012. The mentioned plain packaging scheme regulated by Australia will be collectively referred to as "TPP measures" in this chapter.

1. Objectives of the Law

The TPP Act has two primary stated objectives. The first one concerns the improvement of public health. The sub-objectives for improving the public health are stated as: *"discouraging people from taking up smoking," "encouraging people to give up smoking," "discouraging people who have given up smoking (...) from relapsing,"* and *"reducing people's exposure to smoke from tobacco products."*[106]. The other primary objective is "to give effect to Australia's obligations as a party to the FCTC". The explanatory memorandum of the TPP Bill states: *"introduction of plain packaging for*

[103] Tobacco Plain Packaging Act 2011 (Cth). ("TPP Act")

[104] Tobacco Plain Packaging Regulations 2011 (Cth). ("TPP Regulations")

[105] Trade Marks Amendment (Tobacco Plain Packaging). Act 2011

[106] TPP Act, Section 3.

tobacco products is one of the means by which the Australia Government will give effect to Australia's obligations under the [FCTC][107]*"*, and makes reference to Art. 5, 11 and 13 of the FCTC, as well as the guidelines adopted by the COP for Art. 11 and Art. 13. The Act aims to achieve the mentioned objectives by means of regulating the appearance of tobacco products and their packs. The ultimate goals of doing so are listed as: "*reducing the appeal of tobacco products; reducing the ability of the tobacco packaging to mislead consumers about the harmful effects of tobacco use; and increasing the effectiveness of health warnings*"[108]. Evidently, the purposes of the legislation were explicitly set out in conformity with the purposes of plain packaging as previously discussed[109]. In the explanatory memorandum, the connection between the stated objectives of plain packaging and how it will contribute to its objectives were laid down with reference to empirical studies that provided scientific basis.

2. Requirements on Retail Packaging of Tobacco Products

As per the TPP Act, physical features of the packs must be according to the standards specified in the law, besides carrying the mandated graphic health warnings, textual statements and informative messages. Substantive provisions of the legislation require tobacco packaging to be of rectangular shape, have a matte finish and be drab

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[107] Explanatory Memorandum, Tobacco Plain Packaging Bill 2011 (explanatory memorandum), available at: <http://classic.austlii.edu.au/au/legis/cth/bill_em/tppb2011190/memo_0.html>. (last accessed 30.12.2019)

[108] Ibid.

[109] See above § Ch. 1 (II)(C).

dark brown unless the regulations prescribe a different colour[110].

Most importantly, it explicitly bans the use of non-word trademarks on any part of the packs by prohibiting composite marks and figurative marks[111]. As part of the limited exceptions to this prohibition, only the brand, business or company name, as well as the variant name for the product are permitted to be used on the packs[112]. Utilization of such exceptions are also strictly regulated by the Act and must be in standard font, size and colour, while prohibiting "stylized word marks" as well[113]. Further to the described restriction on trademark use, use of all marks are prohibited on the tobacco products, such as the cigarette sticks and cigars[114]. Breach of the mentioned prohibitions of TPP Act constitutes both civil and criminal liability, pursuant to the severe "offences and civil penalty provisions" of the Act[115].

"The Competition and Consumer (Tobacco) Information Standard 2011" also took effect in December 2012 to operate in conjunction with the Australian Plain Packaging Scheme[116]. By virtue of the requirements set out in the Standard, the surface

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[110] Sections 18, 19. For all main requirements imposed by the Australian Plain Packaging Scheme, see Bond C.: Tobacco Plain Packaging in Australia: JT International SA V Commonwealth and Beyond, QUT Law Review 17 (2), 2017, pp. 1-20, at p. 6.

[111] TPP Act, Section 20(1)

[112] TPP Act, Section 20(3).

[113] TPP Act, Section 21.

[114] TPP Act, Section 26.

[115] TPP Act, Chapter 3.

[116] Parliamentary Secretary to the Treasury, Competition and Consumer (Tobacco) Information Standard 2011, 22 December 2011; Also see Liberman J.: Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia, American Journal of Law & Medicine 39, 2013, pp. 361-381, at

of tobacco packs covered by the mandatory warnings was considerably enlarged. Most notably, the front surfaces of the cigarette packaging were increased to seventy-five percent and the back surface to ninety percent.

3. Intellectual Property-Saving Provisions

Another important feature of the TPP Act lies within its inter-relationships with the Australian laws pertaining to trademark and design[117]. It is prescribed by the TPP Act that the prohibition on the use of trademarks does not hinder the rights of registered trademark owners with regards to tobacco products. It is also provided that non-use of trademarks due to the TPP Act cannot be grounds to refuse a trademark registration or revoke the registration of a trademark[118]. With these provisions, it is explicitly provided that tobacco companies maintain their rights pertaining to trademark registrations, although use of such trademarks are severely restricted. In fact, it is stipulated that the Act *"does not have the effect that the use of a trade mark in relation to tobacco products would be contrary to law."*[119]. Furthermore, rights pertaining to designs as per the Designs Act are also maintained. In cases where a registered design is not used to comply with the prohibitions under the TPP Act, such non-use cannot be grounds for requiring the grant of a license for the design or revoking the registration of the design[120].

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p. 364. ("Plainly Constitutional")

[117] Trade Marks Act 1995 (Cth); Designs Act 2003 (Cth).

[118] TPP Act, Section 28 (3).

[119] TPP Act, Section 28 (2).

[120] TPP Act, Section 29.

These kind of provisions were specifically designed to ensure that tobacco companies preserve their rights to protect, register and maintain the registration of trademarks[121]. Section 28 is particularly important because it prevents tobacco-related trademarks and designs from being subject to legal consequences of non-use. For example, in case there is an application for the removal of a trademark from the registry on the basis that it was not used, this provision provides a basis for the owner of the non-used trademark to defend himself. In this way, the provision holds tobacco-related trademarks exempt from the legal consequences of non-use, eliminating some of the potential arguments of the tobacco companies in relation to trademarks.

4. Safe-Guard Clause in Case of Unconstitutionality

One of the salient provisions of the Act provides that it does not apply "*to the extent that its operation would result in an acquisition of property from a person otherwise than on just terms*[122]*."* It is further stated that:

> *"[In the event that] this Act would result in such an acquisition of property because it would prevent the use of a trade mark or other sign on or in relation to the retail packaging of tobacco products, or on tobacco products, then despite any other provision of this Act, the trade mark or sign may be used on or in relation to the retail packaging of tobacco products, or on tobacco products,*

[121] In the outline of the Explanatory Memorandum, it is provided that: *"(...) [The TPP Act] ensures that its operation will not affect trade mark owners' ability to protect their trade marks from use by other persons, and to register and maintain the registration of a trade mark."*. See Explanatory Memorandum, p. 4.

[122] TPP Act, Section 15 (1).

subject to any requirements that may be prescribed in the regulations for the purposes of this subsection[123]*."*

This provision stands out as a safe-guard clause against the possibility that the operation of plain packaging was found to violate the constitution by a court decision. By virtue of this provision, in case plain packaging as prescribed by the Act was found unconstitutional, an alternative scheme could be operated through regulations in compliance with the verdict of the court, without having to amend the Act[124]. Aware of a possible legal challenge from tobacco companies invoking section 51(xxxi) of the Australian Constitution as discussed below, the Australian government sought to eliminate the possibility of having to compensate tobacco companies in case of an effective challenge.

B. THE CONSTITUTIONAL CHALLENGES

1. Commencement of the Challenges and Claims

The legal challenge brought under the Australian Constitution was initially commenced by the British American Tobacco Group (BAT) against the Commonwealth

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[123] TPP Act, Section 15 (2).

[124] It is stated in the Clause 15 of the Explanatory Memorandum that: *"(...) out of an abundance of caution, this clause provides that the Bill does not apply to the extent that it would cause an acquisition contrary to section 51(xxxi). More specifically, it provides that if preventing the use of trade marks on tobacco products or their packaging, without providing compensation, is contrary to section 51(xxxi) of the Constitution, the trade marks can be used.*". Also see Liberman, Plainly Constitutional, p. 367.

of Australia on 1 December 2011[125]. Various other members of the tobacco industry that had relevant rights in Australia, namely Philip Morris Ltd (PML), Van Telle Tabak Nederland BC and Imperial Tobacco Australia Ltd also intervened in the case[126]. JT International SA (JTI) commenced a separate litigation on similar grounds on 15 December 2011[127].

The main arguments of the tobacco companies were based on section 51(xxxi) of the Australian Constitution. This section gives power to the Australian Parliament to regulate with respect to *"the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.*[128]*"* In that vein, it also guarantees remuneration on "just terms" when the power to acquire property is exercised[129]. In both cases, the plaintiffs argued that the TPP measures resulted in the acquisition of their IP rights and goodwill without fairly compensating them. Concerning the IP that was purportedly acquired, JT's claims were based on the loss of its trademarks and associated get-up, while BAT extended its claims to, inter alia, its copyrights, designs and even patents. On the other hand, the plaintiffs claimed that

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[125] British American Tobacco Australasia Limited v Commonwealth of Australia, Writ of Summons (filed 1 December 2011, High Court of Australia).

[126] Van Nelle Tabak Nederland BV and Imperial Tobacco Australia Limited v Commonwealth of Australia, Writ of Summons (filed 6 December 2011, High Court of Australia; JT International SA v Commonwealth of Australia, Writ of Summons (filed 15 December 2011, High Court of Australia); Philip Morris Limited v Commonwealth of Australia, Writ of Summons (filed 20 December 2011, High Court of Australia).

[127] JT International SA v Commonwealth, Writ of Summons (filed 15 December 2011, High Court of Australia).

[128] Commonwealth of Australia Constitution, s 51(xxxi).

[129] Bond, p. 7.

plain packaging constituted an acquisition of the mentioned property with respect to the Constitution because they were *"unable to exploit their claimed property, especially their trademarks and product get-up, in connection with the sale of cigarettes in any meaningful or substantive way*[130]*"*. They claimed that, by forbidding the use of their IP's on their products, the Act prevented them from promoting the sale of their products. The Act would thus effectively decrease the sales of the tobacco companies, and the value of their IP's, both of which will result in a reduced value of their businesses[131].

2. Decision of the High Court of Australia

After considering the claims of the plaintiffs, the High Court of Australia ruled that the TPP Act did not amount to an "acquisition of property" as required by the Section 51 (xxxi), hence the adoption of plain packaging did not breach the Australian Constitution. The decision was taken by a six to one majority.

Although all members of the Court agreed that the intellectual property owned by the plaintiffs were "property" within the meaning of Section 51 (xxxi), the question whether plain packaging constituted an "*acquisition*" of such property under the Constitution was answered negatively by the majority[132]. While it was generally agreed

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[130] JT International SA v Commonwealth of Australia, British American Tobacco Australasia Limited v The Commonwealth, [2012] HCA 43, 15 August 2012, S409/2011 & S389/2011 ("High Court Judgement"), Crennan J, para. 262

[131] High Court Judgement, Hayne and Bell JJ, para. 163

[132] In fact, an explicit provision in the Australian Trade Marks Act 1995 (Cth) stipulates the nature of registered trademarks as property, in Section 21(1).

upon by the Members of the Court that related measures substantially limited the ability of tobacco companies to use their IP, restriction on a right of property or "*even its extinction*" was not found sufficient to constitute an acquisition. Based on the established case law of the High Court, it was held that the Commonwealth must have acquired *"an interest in property, however slight or insubstantial it may be*[133]*"* for the TPP Act to amount to an acquisition as enshrined in the Section 51 (xxxi). Thus, due to the simple fact that no proprietary interest was transferred to the Commonwealth; and it did not assume any of the property for its own use; the majority ruled that no acquisition took place as required by the Constitution.

The next question the Court aimed to consider was, whether the TPP Act provided just terms or whether the plain packaging was a reasonable and proportionate measure that negated any compensation in just terms as the Commonwealth submitted[134]. The Court, however found that it did not need to rule on these issues after establishing that the act did not amount to an acquisition.

3. Dissenting Opinion

The only member of the High Court who dissented the majority decision took a more expansive approach towards the effects of plain packaging on IP rights within the context of Section 51 (xxxi)[135]. With regards to acquisition, citing a number of High Court

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[133] High Court Judgement, Hayne and Bell JJ, para. 169

[134] See Voon T.: Acquisition of Intellectual Property Rights: Australia's Plain Tobacco Packaging Dispute, European Intellectual Property Review, 2013, vol. 2, pp. 113-118, (Acquisition of IPRs), at p. 5.

[135] Ricketson S.: Plain Packaging Legislation for Tobacco Products and Trade Marks in the High Court of

authorities supporting his views, he opined that it is not required for the State or some other person to obtain an interest in property for the purposes of Section 51 (xxxi). In his words, *"some identifiable benefit or advantage relating to the ownership or use of property"* should be sufficient for the Section to apply[136]. As per this broad interpretation, he held that the State has acquired benefits from the use of intellectual property rights owned by tobacco companies. Such benefits were acquired through depriving right holders from having the control on the appearance of their products and their packaging. Furthermore, enlargement of mandatory health warnings thanks to the vacant portions of tobacco packaging as per the TPP measures also constituted acquisition of benefits according to Justice Heydon[137]. In light of these findings, he proposed that the TPP Act had taken an "identifiable and measurable advantage" with regards to the proprietorship of property and conferred it on the Commonwealth, therefore constituting an acquisition.

Some of the findings contained in the Justice Heydon's dissenting opinion are particularly noteworthy with regards to plain packaging's compatibility with trademark rights. One of the important grounds for his conclusion is his characterization of the IP rights effected by plain packaging. In fact, whether trademarks confer their owners a right to use them has been the most controversial issue that emerged with Australia's adoption of plain packaging. The predominant opinion of the commentators with regards to this issue has been that trademarks only confer negative rights, i.e. to exclude other parties from using them[138]. What makes the adverse argument that trademarks confer a positive

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Australia, Queen Mary Journal of Intellectual Property 3(3), pp. 224-240, at p. 234.

[136] High Court Judgement, Heydon J, para. 200.

[137] High Court Judgement, Heydon J, paras. 217-219.

[138] See e.g. Davison M./Emerton P.: Rights, Privileges, Legitimate Interests, and Justifiability: Article 20

right to use plausible in the case of Australia is that under a provision entitled "*Rights given by registration of trade mark*" in the "Australian Trade Marks Act 1995", it is provided that a trademark owner acquires the "exclusive right to use the trademark" once the trademark is registered[139]. In fact, according to Evans and Bosland who scrutinized the TPP measures consistency with Australian Constitution, the Australian legislation confers both negative rights and positive rights at the same time[140]. In spite of the wording of the mentioned provision that implies an inherent "right to use", the majority of the Court interpreted the right granted by this provision as a negative right to exclude other parties, rather than a positive right to use it in person[141]. Justice Heydon did not agree with this interpretation and proposed that the relevant Australian legislation also gave positive rights to use, rather than a mere negative right to exclude others[142]. He stated

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of TRIPS and Plain Packaging of Tobacco, American University International Law Review 29(3), 2014, pp. 505-580; Bonadio E.: On The Nature of Trademark Rights: Does Trademark Registration Confer Positive or Negative Rights?, City Law School Research Paper No. 2017/01, London, UK; Correa C.M.: Is the Right to Use Trademarks Mandated by the TRIPS Agreement?, South Centre Research Paper 72, 2016.

[139] Trade Marks Act 1995, Section 20 is as follows:

"(1) If a trade mark is registered, the registered owner of the trade mark has, subject to this Part, the exclusive rights:

(a) to use the trade mark; and

(b) to authorise other persons to use the trade mark;

in relation to the goods and/or services in respect of which the trade mark is registered."

[140] Evans S./Bosland J.: Plain Packaging of Cigarettes and Constitutional Property Rights, In Mitchell A./ Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012, pp. 48-80, at pp. 52-56.

[141] See eg. High Court Judgement, French J, para. 36; Crennan J, para. 248.

[142] High Court Judgement, Heydon J., para. 208.

that: *"a right to exclude others from use is not of value unless the owner of the right can engage in use*[143]*."* In that vein, in addition to the recognition of property rights as affected by the plain packaging, he also recognized the "right to use" conferred to trademark owners.

On the other hand, Justice Heydon's conclusions set against some of the main provisions of the TPP Act that were aimed to ensure that the Act does not completely remove the IP rights of tobacco companies. For instance, against the argument that the use of trademarks were not entirely forbidden, he stresses the fact that plain packaging removes the most significant use of them, which is the *"connection with retail customers as they purchase and use tobacco products*[144]*".* According to Justice Heydon, leaving the formal ownership of the property rights in the proprietors and not depriving them of their proprietorship are not important in the face of depriving them of everything that made those properties worth having in the first place, which are to have control on the use of those rights and to reap benefits through such control[145].

[143] Ibid.

[144] High Court Judgement, Heydon J, para. 214.

[145] High Court Judgement, Heydon J, para. 216.

C. INVESTMENT ARBITRATION

1. Commencement of Arbitration and Claims Against Australia

Only one hour after the TPP Act was passed, Philip Morris Asia Ltd., a company based in Hong Kong, which owned the shares of Australia incorporated Philip Morris (Australia) Ltd., served the Government of Australia with a Notice of Claim requesting the Government to "cease and discontinue all steps toward enacting plain packaging legislation[146]." The claim was submitted under the BIT signed in 1993 between Australia and Hong Kong, which allows for investors of each contracting party to file an arbitration claim directly against the host State[147]. PMA submitted that it would initiate arbitral proceedings in case the plain packaging legislation was enacted. The Government of Australia did not retreat and the parties did not reach a settlement in the cooling-off period of three months[148]. Consequently, PMA served a Notice of Arbitration on 21 November

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[146] Philip Morris Asia Ltd, 'Written Notification of Claim by Philip Morris Asia Limited to the Commonwealth of Australia pursuant to Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments' (27 June 2011). The Hong Kong based Philip Morris Asia Ltd will be referred as "PMA" in this section. Votova J.: Philip Morris sues to block new Australia tobacco label requirements, Jurist (online news article), 21 November 2011, available at: <https://www.jurist.org/news/2011/11/philip-morris-sues-to-block-new-australia-tobacco-label-requirements/#>. (last accessed 30.12.2019)

[147] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments ("Hong Kong - Australia BIT"), 1748 UNTS 385 (signed and entered into force 15 September 1993)

[148] Hong Kong - Australia BIT, Art. 10. States: *"A dispute between an investor of one Contracting Party*

2011 and submitted the dispute to international arbitration under the UNCITRAL Rules as per the Article 10 under the BIT[149]. An international arbitration case was thereby commenced against the Government of Australia for the implementation of plain packaging[150].

PMA's claims were mainly grounded on the impacts of the prohibition of the use of their IP on packaging. PMA argued that it owned a number of IP's in Australia, as well as the corresponding goodwill that Philip Morris generated from the use of such IP, all of which purportedly qualified as investments [151]. The most relevant intellectual property owned by PMA which were affected by the plain packaging scheme were of course the trademarks that had been used to represent a number of brand families such as Marlboro[152]. According to the Claimant, by barring the utilization of trademarks on their products and packaging, the Australian Government transformed their branded products to commoditized products which, in turn, "*substantially diminished*" the value of PMA's

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and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three-month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules."

[149] UNCITRAL, The Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2010).

[150] Philip Morris Asia Ltd (Hong Kong) v Australia, Permanent Court of Arbitration, Case No 2012-12, 22 June 2011 ("PMA v Australia").

[151] PMA v Australia, Notice of Claim, para. 9.

[152] PMA v Australia, Notice of Claim, para.23.

investments in that country[153]. Based on this argument, PMA claimed that the TPP measures amounted to violations of a number of substantive obligations afforded by the Hong Kong – Australia BIT. The key substantive claims raised by the Claimants in this case were grounded on the expropriation of IP and denial of fair and equitable treatment[154].

PMA sought an order from the Arbitral Tribunal that the Australian Government suspended the enforcement of its legislation, and an award of damages for the loss incurred due to the implementation of plain packaging[155]. Alternatively, the company sought an award for its losses suffered by means of damage to its investments *"in an amount to be quantified but of the order of billions of Australian dollars"* in case the Tribunal decides to uphold the plain packaging legislation[156].

In Response, Australia rejected all claims by PMA on merits and made a number of preliminary objections concerning the jurisdiction admissibility of PMA's claims[157]. The tribunal held that two of the preliminary objections made by Australia could be heard at a preliminary phase and bifurcated the proceedings to rule on these objections before considering the merits of the case[158]. The first one was that PMA's investment had not

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[153] PMA v Australia, Notice of Arbitration, para. 1.5.

[154] For a detailed discussion of these claims, see generally Mitchell A.D.: Tobacco Packaging Measures Affecting Intellectual Property Protection under International Investment Law: The Claims against Uruguay and Australia, In The New Intellectual Property of Health: Beyond Plain Packaging, 2016. ("IP Protection under International Investment Law").

[155] PMA v Australia, Award on Jurisdiction and Admissibility, 17 December 2015 ("Award"), para. 8.2.

[156] PMA v Australia, Award, para. 8.3.

[157] PMA v Australia, Award, para. 9.

[158] Mitchell, IP Protection under International Investment Law, pp. 223-224.

been properly admitted by Australia pursuant to its BIT signed with Hong Kong[159]. The second objection was concerning the time when dispute arose, i.e. temporal objection. This objection was put on two levels: firstly, Australia alleged that the jurisdiction *ratione temporis* was not satisfied because the dispute had arisen before PMA made its investment in Australia; and secondly, even if PMA made the investment prior to the date of dispute, the corporate restructuring in the Philip Morris subsidiaries that led to the Hong Kong based PMA acquiring the shares of the Australian companies had been made abusively with the intention of gaining treaty protection[160].

2. Decision of the Arbitral Tribunal

After considering the preliminary objections, the Tribunal issued its "Award on Jurisdiction and Admissibility" on 17 December 2015. Whilst dismissing other objections made by Australia, the Tribunal agreed that the restructuring was made abusively for the *"principal, if not sole, purpose of gaining Treaty protection",* and thus found that the

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[159] Hong Kong - Australia BIT, art. 1(e) states: *"(...) 'investment' means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time, and in particular."* Also, Art. 2(1) states: "*Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its right to exercise powers conferred by its laws and investment policies, shall admit such investments."*

[160] See Hepburn J./Nottage L.R.: Case Note: Philip Morris Asia v Australia, The Journal of World Investment and Trade 18 (2), 2017, pp. 307-319, at p. 3; also see Mitchell, IP Protection under International Investment Law, p. 223.

commencement of arbitration against Australia amounted to an abuse of rights[161]. In the words of the Tribunal, the decision took its basis from the principle that:

> *"the commencement of treaty-based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable[162]."*

Relying on the previous arbitral decisions, the Tribunal drew a distinction between legitimate restructuring and restructuring for abuse of process[163]. The Tribunal then looked for *"a reasonable prospect that a measure that may give rise to a treaty claim will materialize"*[164]. Due to the fact that PMA acquired the shares of the Australian subsidiary, Philip Morris (Australia) Ltd, after the announcement of the government's intent to mandate plain packs, the Tribunal established that a dispute was foreseeable and had a reasonable prospect when the investment was made. Furthermore, the Tribunal was convinced that the mentioned corporate transaction was made for "*the principal purpose of gaining treaty protection*" since the PMA could not establish any legitimate reason for its restructuring[165].

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[161] PMA v Australia, Award, para. 584.

[162] PMA v Australia, Award, para. 585.

[163] See Johnson H.: Investor–State Dispute Settlement and Tobacco Control: Implications for Non-Communicable Diseases Prevention and Consumption-Control Measures, QUT Law Review 17 (2), 2017, pp. 102-130, at p. 119.

[164] PMA v Australia, Award, paras. 435, 553.

[165] Such practices carried out for the purposes of gaining treaty protection are called "treaty shopping" in the field of international investment law. For review of the concept and other cases of treaty shopping see: Puukka J.: Treaty Shopping in International Investment Law – Setting Limits on Corporate Restructuring

Due to the above-mentioned facts, the Tribunal concluded that the commencement of this arbitration amounted to an abuse of rights, therefore the claims raised by PMA was found inadmissible and the Tribunal precluded itself from exercising jurisdiction over the dispute[166]. On its final award regarding costs, the Tribunal further ordered PMA to pay Australia all the costs incurred due to the arbitration proceedings[167].

Since the first treaty-based arbitration dispute concerning plain packaging against an implementing State failed due to inadmissibility, the merits involving claims of substantive provisions under an investment treaty is yet to be considered by an arbitral tribunal. Nevertheless, most critics who assessed the claims of PMA found their case weak and opined that tobacco companies would not prevail on the merits as well[168]. It was further proposed by Voon and Mitchell that, even in the case of an adverse arbitral award against Australia related to the plain packaging scheme, enforcement of such an award would face potential difficulties[169].

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to Gain Access to Investment Protection, Helsinki 2018.

[166] PMA v Australia, Award, para. 588.

[167] PMA v Australia, Final Award on Costs (8 July 2017).

[168] See e.g. Mitchell, IP Protection under International Investment Law, p. 232; Voon T./Mitchell D.: Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia, Journal of International Economic Law 14 (3), 2011 ("Time to Quit"); Hunter J.M., Investor-State Arbitration and Plain Packaging: The New 'Anti-Tobacco Movement' Has Begun, Kluwer Arbitration Blog, 2012; Mitchell A./Wurzberger S.: Boxed In? Australia's Plain Tobacco Packaging Initiative and International Investment Law, Arbitration International 27, 2011.

[169] See generally Voon/Mitchell, Time to Quit.

D. CHALLENGES UNDER THE WTO DISPUTE SETTLEMENT UNDERSTANDING

1. Complaints Against Australia and Commencement of Proceedings

The complaints against Australian plain packaging scheme in the context of WTO law date back to the TRIPS Council Meeting on 7 June 2011, when the Dominican Republic submitted that Australia violated its obligations under the TRIPS Agreement and the Paris Convention by adopting the TPP measures[170].

Ukraine commenced the first proceedings against Australia about its plain packaging scheme by submitting a request for consultation under the "Dispute Settlement Understanding" ("DSU") of the WTO on 13 March 2012[171]. Ukraine's complaints were

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[170] A number of other WTO members such as Honduras, Nicaragua, Ukraine, the Philippines, Zambia, Mexico, Cuba and Ecuador supported Dominican Republic's stance at this meeting. See WTO, News Item: Members debate cigarette plain-packaging's impact on trademark rights (7 June 2011), available at: <https://www.wto.org/english/news_e/news11_e/trip_07jun11_e.htm>. (last accessed 30.12.2019)

[171] Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Request for the Establishment of a Panel by Ukraine, WT/DS434/11, 17 August 2012; Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), 15 April 1994, available at: <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>. (last accessed 30.12.2019)

The dispute settlement mechanism of the WTO was established pursuant to the DSU. According to this agreement, once a complaint has been filed against a member state, the dispute can be settlement either through consultations between parties, or through a quasi-judicial adjudication performed by a panel which is binding on the parties. The mechanism is comprised of three main stages: consultations between parties, adjudication by subsequent panels, and the implementation of the ruling. If there is no settlement at the

followed by Honduras, Dominican Republic, Cuba and Indonesia. Consultations were held accordingly between these countries and Australia, all of which failed to resolve the dispute. Thereafter, the complainants requested panels to be established pursuant to the DSU. Following the requests of these countries, The WTO "Dispute Settlement Body" ("DSB") established dispute settlement panels for each complaint[172]. As per the procedural agreement signed between Australia and the complainants, the proceedings for all five disputes were harmonized so that they could be heard together[173]. Around 40 WTO members have notified their interests in joining the proceedings, including Turkey. On the other hand, the disputes attracted a number of third parties such as health advocacy organizations, industrial groups and IP rights organizations. Ukraine ultimately suspended its complaints while the proceedings for the remaining four countries carried on.

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consultation proceedings, then a panel is established to prepare a report on the dispute. Such report may be appealed by the parties. In that case, the Appellate Body performs an appellate review. For further information on the WTO dispute settlement mechanism, see Van den Bossche P.: The Law and Policy of the World Trade Organization: Text, Cases and Materials (2nd Edition), Cambridge 2008, pp. 169-316; Kaya T.: Dünya Ticaret Örgütü (DTÖ) Anlaşmalarının İç Hukukta Uygulanması, İstanbul 2015, pp. 59-71.

[172] WTO Dispute Case, Australia — Certain Measures Concerning Trademarks, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging. The case numbers are as follows: DS434 (brought by Ukraine), DS435 (Honduras), DS441 (Dominican Republic), DS458 (Cuba) and DS467 (Indonesia).

[173] WTO, Procedural agreement between Australia and Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia, WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16, 28 April 2014, available at: <https://dfat.gov.au/trade/organisations/wto/wto-disputes/Pages/australia-trademarks-and-other-plain-packaging-requirements-applicable-to-tobacco-products-and-packaging-wt-ds434-australia.aspx.> (last accessed 30.12.2019)

The complaints were grounded on the inconsistency of Australian plain packaging laws with the "Agreement on Technical Barriers to Trade" ("TBT Agreement"), "Agreement on Trade Related Aspects of Intellectual Property Rights" ("TRIPS Agreement") and the "General Agreement on Technical Barriers to Trade" ("GATT"). After lengthy proceedings and examination of voluminous evidence with regards to these complaints, the Panel publicly circulated its final report on 28 June 2018[174]. Ultimately, the Panel dismissed all claims asserted by the complainants with regards to compatibility of TPP measures with WTO rules. The Panel Report consists of 884 pages and includes assessment of a wide range of evidence, arguments and views submitted both by parties to the dispute and third parties that joined the proceedings, along with complex legal issues which had not been examined in detail by WTO panels before. For the purposes of this thesis, the key points of the Panel's analysis on the compatibility of plain packaging with TBT Agreement and TRIPS Agreement will be discussed below.

It should be noted that Honduras and Dominican Republic has appealed the Panel's decision, whilst Cuba and Indonesia did not file an appeal. At the time of writing, the Appellate Body has not decided on the appeals by Honduras and Dominican Republic.

2. Analysis of the Claims under TBT Agreement

The TBT Agreement was prepared with the aim of ensuring that national regulations of the member countries, along with standards, testing and certification

[174] Panel Reports Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS435,441,458,467/R, ("Panel Report").

procedures do not create "technical barriers" to international trade. For that purpose, it imposes certain rules on the member countries concerning their national regulations of products, their characteristics and production[175]. Complainants have argued that Australia violated the TBT Agreement with the adoption of the TPP measures, particularly Art. 2.2 which prohibits members from adopting measures that would create "unnecessary obstacles to international trade[176]". As to whether plain packaging laws of Australia can be covered by the said Agreement, the Panel first discussed the applicability of the agreement to the case. Then, it considered whether the plain packaging laws amount a "technical regulation" within the context of the said agreement. The Panel then examined the main question concerning the compatibility of plain packaging laws with Art. 2.2. For the purpose of answering this question that required a deep analysis, the Panel had to deal with a number of sub-questions. Panel's analysis of the afore-mentioned questions and its subsequent reasoning will be discussed below.

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[175] See Van den Bossche P.: The Law and Policy of the World Trade Organization: Text, Cases and Materials (2nd Edition), Cambridge 2008, pp. 805-832.

[176] Art. 2.2 of the TBT Agreement: Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

a. Whether Both the TBT and TRIPS Agreements Apply to the Plain Packaging Laws

First of all, the Panel assessed Australia's defense that the TPP measures which limit the use of trademarks did not fall under the TBT Agreement, on the basis that it is covered by the TRIPS Agreement which deals with IP rights[177]. Accordingly, the Panel considered the relationship between the two mentioned WTO agreements, in order to find whether the complaints concerning the trademark requirements could be covered by the TBT Agreement[178]. The Panel found that measures affecting the use of IP, such as plain packaging, may be covered by related provisions of the TBT Agreement as well, provided that they enter into scope of those provisions[179]. Nevertheless, the panel examined the relationship between Art. 2.2 of the TBT Agreement and Art. 20 of the TRIPS Agreement as the relevant provisions in particular within the context of the dispute. Having found that the subject provisions of the agreements did not create a conflict, but rather complemented each other, the Panel concluded that both agreements could apply

[177] The reason underlying Australia's contention was the fact that the "test of unjustifiability" required under Art. 20 of the TRIPS Agreement is relatively easier for a respondent state to defend compared to the "necessity test" under Art. 2.2 of the TBT Agreement. See Carvalho N.P.: The TRIPS Regime of Trademarks and Designs, 2nd edition, NL 2011, p. 424; Voon T./Mitchell D.: Implications of WTO law for plain packaging of tobacco products, Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012 (Implications of WTO Law), pp. 15-16; Kaya T.: Uluslararası Ticaret ve Yatırım Hukuku Bakımından Tütün Ürünlerinin Düz Paketlenmesi Meselesi, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 24 (2), 2018, pp. 1045-1085 ("Düz Paketleme"), at p. 1063.

[178] Panel Report, paras. 7.75-107.

[179] Panel Report, para. 7.80.

cumulatively and harmoniously[180].

b. Whether the Plain Packaging Laws Constitute a Technical Regulation within the Meaning of TBT Agreement

Having established that both agreements could be applied to the dispute, the Panel then considered whether the TPP Acts amount to a "technical regulation" as per the TBT Agreement. In the words of the Panel, for a legal instrument to be considered a technical regulation, it must "(i) apply to an identifiable group of products, and (ii) lay down one or more characteristics of the products, (iii) with which compliance is mandatory"[181]. Finding that the Australian TPP measures satisfied all three of the mentioned criteria, the Panel ruled that they must be considered as "technical regulations" within the scope of the agreement[182].

c. Whether Plain Packaging Is "More Trade-Restrictive Than Necessary to Fulfil a Legitimate Objective" within the Meaning of Article 2.2

As mentioned above, Art. 2.2 obliges members to make sure that their technical regulations do not create "unnecessary obstacles to international trade". Further, it was provided that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

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[180] Panel Report, para. 7.106.

[181] Panel Report, para. 7.114.

[182] Panel Report, paras. 7.108-183.

For determining whether the plain packaging laws was in violation of this article, the Panel had to consider various sub-questions such as; whether plain packaging restricts trade at all, it is more restrictive than necessary, it has a legitimate objective, and it is within the scope of exceptions provided in the agreement. Panel's analysis of such sub-questions and its overall conclusion will be briefly discussed below.

aa) Whether Plain Packaging Pursues a Legitimate Objective

Art. 2.2 provides that a "legitimate objective" may legitimize the creation of a trade obstacle in form of a technical regulation[183]. Further, it provides a non-exhaustive list of legitimate objectives that includes, inter alia, "protection of human health or safety, animal or plant life or health". As mentioned earlier, the TPP Act had two clear primary objectives. The first one relates to the improvement of public health by means of decreasing the prevalence of tobacco use. Therefore, it was not difficult for Australia to argue that it had a legitimate objective in adopting plain packaging. In face of scientific evidence with regards to deathly hazards of tobacco use and exposure to its smoke, the Panel accepted that the mentioned objective of Australia was legitimate as per Art. 2.2[184].

[183] Van den Bossche, p. 819.

[184] Panel Report, para. 7.216-7.251.

bb) Whether Plain Packaging is Compatible with Relevant International Standards

Art. 2.5 of the TBT Agreement provides that:

"Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade".

As noted by Van den Bossche, taken together with Art. 2.2, international standards can exempt trade-restrictive regulations which has one of the legitimate objectives laid down under this article from the necessity requirement[185]. As such, having established that Australia had one of the prescribed legitimate objectives, if its regulations were found in compliance with relevant international standards, the Panel would not have to conduct a necessity test in terms of trade-restrictiveness[186].

Accordingly, Australia argued that its plain packaging laws complied with the relevant international standards which were the guidelines related to Art. 11 and Art. 13 of the FCTC[187]. The Panel noted that this was the first time when a "relevant international standards" argument was invoked under Art. 2.5[188]. For the examination of this argument,

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[185] Van den Bossche, p. 823.

[186] Before the Panel concluded its report, Gruszcynski posited that there were good grounds for the Panel to consider WHO FCTC and its guidelines as 'relevant international standards' for the purpose of the TBT Agreement as contended by Australia. See Gruszczynski L., The WHO FCTC as an international standard under the WTO Agreement on Technical Barriers to Trade, Transnational Dispute Management 9 (5), 2012.

[187] Panel Report, para. 7. 377-383.

[188] Panel Report, para. 7. 264.

the Panel decided that two questions should be answered: whether the FCTC guidelines are "relevant international standard" for tobacco packs; and whether the Australian regulations were compatible with the guidelines as per the second sentence of Art. 2.5[189].

Concerning the first question, the Panel conducted a detailed analysis of Art.11 and Art. 13 Guidelines[190]. For the meaning of "standard" as prescribed by Art. 2.2, the Panel relied on the definition as per Annex 1.2 of the agreement[191]. Upon its detailed analysis, The Panel concluded that the mentioned guidelines do not amount to a "document" that contains a "standard" in terms of Annex 1.2 of the agreement. While noting the relevant parts of the guidelines that explicitly recommend plain packaging "could be considered to be guidelines providing for product characteristics", the Panel emphasized the flexibility provided by FCTC in determining the ways that they fulfill their obligations under the Treaty. Thus, it found that the guidelines did not provide tobacco packaging characteristics for "common and repeated use". The Panel took this flexibility and the nature of the FCTC obligations that require the guidelines "to be read in light of the relevant obligations in the FCTC itself" as reasons for not constituting a standard[192].

Having determined that plain packaging did not constitute a "standard", Panel did

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[189] Panel Report, para. 7. 260-263.

[190] Panel Report, para. 7. 264–397.

[191] A "standard" is defined in Annex 1.2 to the TBT Agreement as a: *"Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method."*

[192] Panel Report, para. 7. 396.

not further consider the second question, which was whether they are compatible with the related sections of the mentioned guidelines. Overall, the Panel drew the conclusion that the subject measures were found not to be "in accordance with relevant international standards" as per Art. 2.5. Thus, Australia could not benefit from the rebuttable presumption that they were not trade-restrictive than necessary. For this reason, the Panel proceeded to consider the rest of the sub-questions which were outlined in section 7.2.2 of the Panel Report.

cc) Contribution of Plain Packaging to Its Objective

Having established that plain packaging' goal is to improve public health, the Panel considered the extent to which the subject measures contribute to this objective. Making reference to the WTO case law, the Panel sought to ascertain the "actual contribution" of the measure, "as written and applied" to its goal[193]. For its analysis, the Panel took account of the contribution of challenged measures to following three goals: "Reducing the appeal of tobacco products", "increasing the effectiveness of health warnings" and "reducing the ability of packaging to mislead consumers about the harmful effects of smoking". Panel conducted this analysis through scrutinizing extensive range of evidence submitted by the parties to the dispute, as well as third parties who joined the proceedings. These evidence included scientific studies and surveys related to design, structure and application of the Australian regulatory scheme, as well as the empirical evidence available to date relating to the implementation of plain packaging in Australia

[193] WTO Appellate Body Report, United States — Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/39 WT/DS386/40, adopted 23 July 2012, para. 461.

since its entry into force.

Whilst acknowledging that "*the drivers of smoking behaviors are complex and that smoking initiation, cessation or relapse are influenced by a broad range of factors, other than product packaging*", the Panel concluded that the complainants could not prove that plain packaging did not make contribution to its objectives[194]. In fact, in the totality of the evidence it examined, the Panel found that, together with other comprehensive range of measures implemented by Australia, plain packaging "*is apt to, and do, make a meaningful contribution to Australia's objective of reducing the use of, and exposure to tobacco products.*[195]". Notably, the Panel emphasized that plain packaging can potentially play even more important role in "dark markets" such as Australia where packaging would be the only avenue for tobacco companies to convey any positive associations with their products[196].

In addition, the Panel also considered the arguments related to the growth of illicit tobacco market in Australia after the plain packaging entered into force. After examining the related evidence, the Panel ruled that the complainants failed to display such negative effect of plain packaging Australia that would undermine its objectives[197].

[194] Panel Report, para. 7.1032.

[195] Panel Report, para. 7.1043.

[196] Panel Report, para. 7.1032.

[197] Panel Report, para. 7.993-1023.

dd) Whether Plain Packaging Restricts Trade

Thereafter, whether the TPP measures restricted trade was considered by the Panel as an aspect of the wider evaluation of whether they are "*more trade-restrictive than necessary"* as per Article 2.2[198]. In fact, Australia contended that plain packaging did not restrict trade at all[199].

The concept of trade-restrictiveness is foundational to WTO law and was mentioned in other legal instruments besides TBT Agreement. However, by the time when the plain packaging dispute was commenced under the DSU, it had not been clearly defined and theorized under WTO law, thus its precise scope remained uncertain[200]. Considering the sui-generis nature of plain packaging as a measure which does not explicitly discriminate any imported products, but instead aims to reduce the sales of all tobacco products, whether domestic or not, for the clear purposes related to public health, it raised some difficult questions for the Panel to answer within this context[201].

The Panel thus sought to first elaborate on the term "*trade-restrictive*" stipulated in Art. 2.2. Parallel to a TBT Committee Recommendation concerning Art. 2.9 of the same agreement which was interpreted by the Panel in its analysis, the Panel took note of what was described as "significant effect on trade of other Members"[202]. The Panel

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[198] Panel Report, para. 7.1071.

[199] Panel Report, para. 7.23.

[200] See generally Voon T.: Exploring the Meaning of Trade-Restrictiveness in the WTO, World Trade Review, 2015.

[201] İbid, p. 452, 476.

[202] WTO, TBT Committee, Secretariat Note: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, WTO Doc G/TBT/1/Rev.12 (21 January

accordingly found that the effects of plain packaging on trade between *all* WTO members were not needed to assessed, contrary to what Australia suggested[203].

After considering the meaning of "trade-restrictiveness" and how it should be assessed, the Panel went on to consider its applications to plain packaging. In line with its previous considerations, the Panel sought to answer the following questions: whether TPP measures "alter the competitive environment of producers in the Australian market", whether they have a "limiting effect on the volume and value of trade in tobacco products", whether they "impose conditions on the sale of tobacco products that entail compliance costs" and "whether the penalties under the TPP Measures restrict trade"[204]. After the analysis of these questions, the Panel concluded that:

> *"the TPP measures are trade-restrictive, insofar as, by reducing the use of tobacco products, they reduce the volume of imported tobacco products on the Australian market, and thereby have a 'limiting effect' on trade"*[205].

On the other hand, the Panel was careful to note that plain packaging had not decreased the overall value of tobacco products up to date and the conditions imposed by Australian regulations on the sale of tobacco products, as well as the compliance costs amounted to a limiting effect to trade.

While establishing that Australian plain packaging was trade-restrictive in the context of the agreement, the Panel stressed the fact that determining trade-restrictiveness of plain packaging was only one element of the assessment of the measures compatibility

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2015).

[203] Panel Report, para. 1088.

[204] Panel Report, para. 1160-1254.

[205] Panel Report, para. 1255.

with Art. 2.2. since the article concerns "*restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective*"[206]. Therefore, the Panel went on the consider whether the restrictions to trade imposed by means of plain packaging are more than necessary, considering the risks of non-fulfillment and alternative measures.

ee) The Nature and Gravity of the Risks of Non-Fulfilment

Before considering the possible alternative measures, the Panel examined the nature and gravity of the risks in case the objective of plain packaging was not fulfilled. After discussing the available scientific and technical evidence, the Panel identified the risk as non-improvement in public health, since there would be no "reduction in the use of, or exposure to tobacco products in Australia" in case of non-fulfilment[207]. Furthermore, the Panel found that not fulfilling plain packaging's stated objective of improving public health would consequently be particularly grave[208]. Undoubtedly, the Panel reached this conclusion based on the devastating facts concerning hazards of tobacco use and exposure. For example, it was noted the fact submitted by Australia in its report which describes tobacco as "*the only legal consumer product that kills half of*

[206] Panel Report, para. 7.1046; Also see WTO Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012, para. 319.

[207] Panel Report, para. 7.1286-1296.

[208] Panel Report, para. 7.1297-1320.

its long-term users when used exactly as intended by the manufacturer[209]". In light of extensive evidence suggesting that plain packaging could tackle some of these unavoidable consequences of tobacco use, the gravity of non-fulfilment of such an objective was found to be high.

ff) Whether Alternative Measures Are Less Trade-Restrictive Than Plain Packaging

As the final point of its analysis on Art. 2.2, the Panel made a comparative analysis of plain packaging and potential alternatives that would be less trade-restrictive as argued by the complainants. The Panel considered each of the four alternative measures put forward by the complainants that were: raising the "minimum legal purchasing age" to 21 years, increasing taxation, social marketing campaigns and "*pre-vetting*"[210]. None of these measures were found to be able to constitute a substitute measure which would make an "equivalent contribution to the objectives of plain packaging"[211].

d. Panel's Overall Conclusion on Article 2.2.

As explained earlier, the Panel had to answer various questions about plain packaging in order to reach a conclusion on its consistency with Art. 2.2 which concerns

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[209] Panel Report, para. 7.1298.

[210] Complainants put forward the pre-vetting scheme in Turkey as a reasonable and less trade-restrictive alternative top lain packaging. See below § Ch. 3 (II)(B)(5).

[211] Panel Report, para. 7.1717-1723.

"unnecessary obstacles to international trade". The concept of trade-restrictiveness has been the key point of this analysis. The Panel found that Australian plain packaging measures restricts trade indeed. Furthermore, since the relevant guidelines of FCTC articles were not found to be "relevant international standards" for plain packaging, Australia could not benefit from the rebuttable presumption that it did not unnecessarily restricted trade. Nevertheless, the plain packaging laws of Australia was determined not to violate Art. 2.2 after all. This conclusion was based on the analysis of other questions that ultimately persuaded the Panel to determine that Australia pursued a legitimate goal, to "*improve public health by reducing the use of, and exposure to tobacco products*", in adopting the TPP measures that cannot be achieved to an equivalent degree through alternative measures considering "the risks of non-fulfillment of the objective" and "the degree of plain packaging's contribution to this objective". Importantly, in its conclusion, the Panel emphasized states' regulatory discretion in pursuing legitimate objectives "*at the levels it considered appropriate*" by citing the 6th recital of the agreement[212].

Evaluating matters such as the contribution of plain packaging to its objective and its comparison with other tobacco control measures were no doubt a difficult task for the Panel. In considering plain packaging as a tobacco control measure, the Panel took into account the general context of Australia's comprehensive strategy to address tobacco control[213]. It was noted that plain packaging was not designed to act as "*a stand-alone policy*", but was instead adopted as a component of "*a comprehensive suite of reforms to reduce smoking and its harmful effects"* in the country[214]. Thus, the nature of tobacco

[212] Panel Report, para. 7.1731.

[213] Panel Report, para. 7.1728.

[214] Panel Report, para. 7.1729.

control measures that need each measure to operate in conjunction with other measures has been a focal point for the Panel's conclusion on complaints' claims with regards to Art. 2.2.

3. Analysis of the Claims under TRIPS Agreement

The TRIPS Agreement put WTO members under obligations to provide a minimum level of protection and enforcement of IP rights[215]. Some of the issues that have been at the center of critics against plain packaging have been related to the use of trademarks which are under the protection of TRIPS Agreement. Thus, plain packaging's consistency with trademark-related rights have been much debated in the doctrine[216]. The

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[215] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 20, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 108 Stat. 4809, 1869 U.N.T.S. 299, 33 I.L.M. 1197 ("TRIPS Agreement").

[216] See e.g. See Alemanno A./Bonadio E.: Do You Mind my Smoking? Plain packaging of cigarettes under the TRIPS Agreement, John Marshall Review of Intellectual Property Law 10 (3), 2011; Correa, Is the Right to Use Mandated by the TRIPS Agreement?; Davison M.: The legitimacy of plain packaging under international intellectual property law: why there is no right to use a trademark under either the Paris Convention or the TRIPS Agreement, Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012, ("Legitimacy of Plain Packaging"); Davison/Emerton, Rights, Privileges, Legitimate Interests, and Justifiability: Article 20 of TRIPS and Plain Packaging of Tobacco; Frankel S./Gervais D., Plain Packaging and the Interpretation of the TRIPS Agreement; Gervais D.: Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention, Report for Japan Tobacco International, 2010; Marsoof A.: The TRIPs Compatibility of Australia's Tobacco Plain Packaging Legislation, The Journal of World Intellectual Property 16(5-6), 2013; McGrady B.: TRIPS and Trademarks: The Case of Tobacco, World Trade Review 3 (1), pp. 53-82, 2004; Mitchell D.: Australia's

critics against plain packaging, particularly the tobacco industry, have also strongly contended that adoption of plain packaging would be contrary to member states' obligations to ensure protection of trademark rights by virtue of TRIPS Agreement. The claims submitted by the complainants in the WTO case against Australia reflect such arguments voiced by the tobacco industry. Notably, they were supported with legal memorandums published by some of the renowned legal experts in favor of tobacco companies[217].

Below, we will discuss the Panel's analysis on the main claims related to substantive provisions of TRIPS Agreement, in the order followed by the Panel. The analysis made by the Panel starts with the provisions concerning the protection of trademarks[218]. After these claims, the Panel considered the claims related to unfair

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move the plain packaging of cigarettes and its WTO compatibilities, Asian Journal of WTO and International Health Law and Policy 5 (2), 2010 ("Australia's Move"); Voon /Mitchell, Implications of WTO Law; Voon T./Mitchell D.: Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging, Public Law Review, 22 (3), pp. 218–240, 2011 ("Face Off").

[217] See Gervais D.: Report for Japan Tobacco International, Analysis of the Compatibility of Certain Tobacco Product Packaging Rules with the TRIPS Agreement and the Paris Convention, 30 November 2010; Lalive: Memorandum Philip Morris International Management SA, Why Plain Packaging is in Violation of WTO Members' International Obligations under TRIPS and the Paris; Katz J./ Dearden R.: Plain Packaging and International Trade Treaties, In Luik J.(ed), Plain Packaging and Marketing of Cigarettes, Oxfordshire 1998, pp. 111-134.

[218] The first two articles, namely Art. 2.1 of the TRIPS Agreement in conjunction with Art. 6quinquies of the Paris Convention and Article 15.4 of the TRIPS Agreement, concern the protectable subject matter. Thereafter, articles 16.1 and 16.3 of the TRIPS Agreement with regards to the rights conferred to trademark owners will be discussed. Finally, plain packaging's compliance with Art. 20 of the TRIPS Agreement with regards to "other requirements" related to the use of trademarks will be considered.

competition[219]. Lastly, complaints concerning relevant provisions that cover geographical indications were considered by the Panel[220].

a. Article 2.1 of the TRIPS Agreement in Conjunction with Article 6quinquies of the Paris Convention

The first claim analyzed by the Panel concerning the protectable subject matter is consistency of plain packaging with Art. 6quinquies of the Paris Convention[221]. The complainants invoked the Paris Convention in this dispute under Art. 2.1 of the TRIPS Agreement which obliges member states to comply with some of the articles of the Paris Convention[222]. Paragraph A (1) of the related provision of the Convention provides that:

> *"Every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the*

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[219] Related to unfair competition, the Complainants invoked Art. 2.1 of the TRIPS Agreement in conjunction with Article 10bis of the Paris Convention.

[220] Related to GI's, the Complainants invoked Articles 22.2(b) and 24.3 of the TRIPS Agreement.

[221] Paris Convention for the Protection of Industrial Property, done at Paris, 20 March 1883, revised at Stockholm, 14 July 1967, amended 28 September 1979, ("Paris Convention").

[222] Art. 2.1 of the TRIPS Agreement, entitled "Intellectual Property Conventions", reads as follows: "In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)". The mentioned articles in fact include almost all substantive provisions of the Paris Convention. TRIPS member states are thus bound by the substantive provisions provided under Paris Convention whether they are signatories to it or not.

country of origin, issued by the competent authority. No authentication shall be required for this certificate."

According to the complainants, Australia violated this article because the trademarks of the tobacco companies registered in other countries would not be protected "*as is*" under the plain packaging scheme in Australia[223]. This allegation was based on the approach which contends that a state obligation to protect a trademark entails the use of it in "*its original form as registered in its country of origin*".

The Panel rejected the complainants' interpretation of the *"protection"* that Australia is obliged to grant registered trademarks within the context of Art. 6quinquies of Paris Convention[224]. According to the Panel, there was no basis to assert that the relevant provision obliges Australia to provide a substantive minimum standard of rights that includes ascertaining that trademark proprietors use their trademarks. Notably, Section 28 of the TPP Act, as we have referred to as "trademark-saving provisions" above, was found to be sufficient for Australia to demonstrate that trademarks were still protected even though they were no longer placed on tobacco products or packaging[225]. The Panel, therefore, drew the conclusion that the subject measure does not violate the obligation to protect registered trademarks as per Art. 6quinquies of Paris Convention.

[223] Panel Report, para. 7.1738-1742.

[224] Panel Report, para. 7.1758-1774.

[225] See above § Ch. 1 (II)(A)(3).

b. Article 15.4 of the TRIPS Agreement

The second claim of the complainants concerning the protectable subject matter was based on Art. 15.4 which reads as: "*The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.*" According to the complainants, the TPP measures imposed constraints on the registration of trademarks related to tobacco products, solely based on the nature of tobacco products. This assertion was made in conjunction with the reading of Art. 15.1 which provides that trademarks that lack distinctiveness, which is one of the requirements for a trademark to be registered, can acquire distinctiveness through use[226]. In other words, Art. 15.1 obliges member states to allow registration for indistinctive trademarks that acquired distinctiveness through use. Within this context, by banning the use of non-word trademarks, Australia took away the opportunity for tobacco-related non-word trademarks to acquire distinctiveness by way of being used, and consequently created obstacles to registration due to the nature of the goods.

In its Analysis, the Panel explored the meaning of the terms stipulated in Art. 15.4, such as "trademark" and "registration of the trademark" and found that they refer to "signs or combination of signs that meet the distinctiveness requirement set out in Article

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[226] Art. 15.1 of TRIPS Agreement reads as follows: *"Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible."*

15.1"[227]. The Panel thereafter explored the object and purpose of Art. 15.4, in conjunction with Art. 15.1 and found that Art. 15.4 regulate member states' obligations with regards to registration of distinctive signs as trademarks. Accordingly, it concluded that Art. 15.4 does not impose any obligation on member states to allow for the use of signs that do not already fulfill the distinctiveness requirement in the context of Art. 15.1[228]. Therefore, the Panel dismissed the argument that Australia violated its obligations under Art. 15.4.

c. Article 16.1 of the TRIPS Agreement

After dealing with claims concerning protectable subject matter above, the Panel turned to the claims with regards to characteristics of rights conferred under Art. 16. The provisions under Art. 16 generally govern the ways that trademark owners can effectively defend themselves against imitators[229]. Firstly, the complainants argued that Australia violated the first paragraph of Art. 16 concerning the exclusive right conferred to trademark owners. Such exclusive right member states are required to grant is described as follows:

> *"to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion[230]".*

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[227] Panel Report, para. 7.1831.

[228] Panel Report, para. 7.1874, 7.1894.

[229] Stoll P.T./ Busche J./ Arend K.: WTO-Trade Related Aspects of Intellectual Property, NL 2009, p. 317.

[230] Art.16.1 of the TRIPS Agreement, entitled "Rights Conferred" reads as follows:

In this way, the related provision requires member states to enable trademark owners to effectively defend themselves against infringing uses of identical or similar signs in a way that amounts to a "likelihood of confusion".

According to the complainants, Art. 16.1 requires member states to provide a "minimum level of rights" in a manner that enables trademark owners to ensure distinctiveness of their trademarks when exercising their rights against infringements. They argued that plain packaging reduced distinctiveness of tobacco trademarks which caused "a reduction in trademark owners' ability to demonstrate a likelihood of confusion" in case of an infringement[231]. In that sense, not providing "*a minimum opportunity to use*" their trademarks to tobacco-related trademark owners allegedly resulted in not providing the exclusive right conferred by Art. 16.1.

The Panel, however, was not persuaded by this approach and clearly laid down its views on whether the provision contains a right to use trademarks by stating that: *"Article 16.1 does not establish a trademark owner's right to use its registered trademark. Rather, Article 16.1 only provides for a registered trademark owner's right to prevent certain activities by unauthorized parties under the conditions set out in the first sentence of Article 16.1.232"*

"The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use."

[231] Panel Report, para. 7.1966.

[232] Panel Report, para. 7.1978.

Likewise, it found that the obligation of member states to guarantee the exclusive right to prevent infringements under Art. 16.1 did not include providing trademark owners a "minimum opportunity to use" as argued by Complainants. Having established that, the Panel did not even examine whether plain packaging factually reduces distinctiveness of trademarks[233].

There were two more arguments under Art. 16.1 that the Panel dismissed rather easily. One of them contented that the measure will abolish distinctiveness of some registered trademarks that had acquired distinctiveness by use even though they were not inherently distinctive, resulting in potential cancellation of such trademarks contrary to Art. 16.1 [234]. The Panel found this argument to be without merit under Australian law and that it was not demonstrated how cancellation of a trademark would amount to a breach of Art. 16.1[235]. The other argument was that plain packaging required tobacco companies to use deceptively similar marks since the TPP measures standardized the appearance of them, thus violated Art. 16.1 by depriving trademark owners of their right to prevent uses that are capable of creating confusion[236]. The Panel also rejected this argument by finding that prohibition of use of non-word trademarks does not mean that tobacco companies must use similar marks as they can freely choose brand or variant names[237].

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[233] Panel Report, para. 7.2031.

[234] Panel Report, para. 7.2033.

[235] Panel Report, para. 7.2039.

[236] Panel Report, para. 7.2041.

[237] Panel Report, para. 7.2046.

d. Article 16.3 of the TRIPS Agreement

Next on, the Panel analyzed a similar claim under the third paragraph of Art. 16 which grants protection for well-known trademarks[238]. This provision incorporates Art. 6bis under the Paris Convention into TRIPS Agreement and obliges the member states to apply *mutatis mutandis* in extended circumstances where a mark "identical or similar to another mark" which is considered well-known within the context of Paris Convention[239]. The complainants contended that the TPP measures constituted violation of the

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[238] Art. 16.3 of the TRIPS Agreement reads as follows:

"Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use."

[239] Article 6bis of the Paris Convention (1967) reads as follows:

"(1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

(2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith."

obligations set forth in these provisions based on two reasons. First, proprietor a registered well-known trademark must be able to use it in order to maintain its well-known status[240]. Second, acquiring a well-known status is contingent on the use of such trademark in any case[241]. Based on these assertions, they argued that TPP measures prevented them from being protected under Art. 16.3 by prohibiting the use of certain trademarks.

While acknowledging that the TRIPS Agreement recognizes the legitimate interest of the proprietors of well-known marks to use their trademarks in order to maintain its status, the Panel opined that Art. 16.3 only provides an obligation to protect currently well-known trademarks as specified under the relevant provisions[242]. Thus, the Panel found that Art. 16.3 does not extend in a way that requires Australia to ensure a "minimum opportunity" to use trademarks or to abstain imposing measures that impact the maintenance of well-known trademarks[243]. For these reasons, it concluded that plain packaging did not amount to a breach of Art. 16.3 as well[244].

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[240] Panel Report, para. 7.2089.

[241] Panel Report, para. 7.2090.

[242] Panel Report, para. 7.2116, 7.2120.

[243] Panel Report, para. 7.2120.

[244] The Panel also found under the Australian law that for a trademark to gain well-known status, it does not need to be used in Australia. See Panel Report, para. 7.2127.

e. Article 20 of the TRIPS Agreement

Under the previous claims that we have covered so far, the complainants' arguments were based on the constraints plain packaging puts on the use of trademarks. Although the mentioned provisions did not expressly provide for a right (or opportunity) to use trademarks, the complainants argued that they implicitly require the member states to do so. For this reason, the complainants had a hard time in persuading the Panel on these matters, and they ultimately failed to do so. Art. 20 however, expressly addresses use of a trademark and prohibits member states from "unjustifiably encumber the use of trademarks by imposing special requirements". Therefore, probably the strongest argument against Australia in the entire WTO dispute was that the TPP measures violated this article[245]. Hence the plain packaging's compatibility with Art. 20 had been a topic of interest before the Panel issued its ruling[246].

In its interpretation of Art. 20, the Panel laid down three elements for consideration, for the purposes of determining a breach of the "core obligation" stipulated in the first sentence of the provision, and accordingly considered whether each of these

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[245] Art. 20 of the TRIPS Agreement reads as follows: *"The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking."*

[246] See e.g. generally Alemanno/Bonadio; Correa; Davison, Legitimacy of Plain Packaging; Mitchell D., Australia's Move; McGrady; Marsoof; Voon/Mitchell, Face Off.

elements were established in the dispute[247]. The first element was the existence of "special requirements" that "encumber" the use of a trademark. Considering the undisputed fact that the TPP measures only allow for word marks on tobacco packaging which can only be written in the form strictly set out by the regulations, the Panel found that TPP measures indeed have such an effect[248]. It also noted that, by prohibiting use of any stylized elements and mandating a standardized mark in terms of their font and colour, the TPP measures constitute "use in a special form" as provided under the first sentence of Art. 20 and that they encumber the use of trademarks on tobacco packs[249]. At the same time, the Panel noted that the prohibition on the use of composite and figurative marks as well as stylized word marks constitutes "special requirements that encumber the use of trademarks" as well[250].

Thereafter, the Panel considered whether plain packaging's foregoing encumbrance takes place "in the course of trade". Contrary to Australia's reading, the course of trade was interpreted by the Panel to not be limited to "buying and selling", but rather in a manner that covers "commercial activities taking place after the retail sale" as well[251]. The Panel also disagreed with Australia on the interpretation of the term "use" in the sense of the subject provision and found that the relevant use of trademark under the provision does not only entail use for the mere motive of "distinguishing the goods and services of one undertaking from those of others", but extends to a wider range of

[247] Panel Report, para. 7.2156.

[248] Panel Report, para. 7.2241.

[249] Ibid.

[250] Panel Report, paras. 7.2242-2243.

[251] Panel Report, paras. 7.2261-2263.

activities[252]. Based on these interpretations, the Panel ruled that plain packaging indeed takes its effect on the use of a trademark "in the course of trade" under Art. 20[253].

Having established that all other elements provided in Art. 20 were present in this case, the Panel finally turned to the question whether Australia restricted the use of trademarks "unjustifiably" by regulating plain packaging. Since Art. 20 does not expressly define the term, the parties had differing views on the interpretation of unjustifiability. Australia argued that for measure to be found unjustifiable, the Panel had to find no "rational connection between the imposition of the special requirements and a legitimate public policy objective"[254]. On the other hand, the complainants argued that for Australia's measures to be found justifiable, the Panel must apply a stringent test by considering factors such as the extent of the encumbrance, proportionality of the measures, material contribution of the measures to its objective and available alternative less-restrictive measures[255]. In that vein, the Complainant contended that a "necessity test" was required for the determination of "unjustifiability" under Art. 20[256]. The complainants also referred to Art. 17 which encapsulates the concept of "legitimate interests" of the trademarks owners, and argued that it should be considered when

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[252] Panel Report, paras. 7.2285-2286.

[253] Panel Report, para. 7.2292.

[254] Panel Report, para. 7.2329.

[255] For main arguments of the Complainants on "unjustifiability", see Panel Report at paras. 7.2303-2306 (Honduras); paras. 7.2307-2316 (Dominican Republic); paras. 7.2317-2322 (Cuba); and 7.2323-2326 (Indonesia).

[256] The test proposed by the Complainants was to be similar to the necessity test conducted under Article XX(d) of the GATT (1994).

interpreting unjustifiability under Art. 20[257].

The Panel, however, did not fully adopt any party's interpretation. After establishing that the reading of Art. 20 suggests that there can be good reasons that sufficiently support a member state in a justifiable manner, the Panel considered what such reasons could be within the context of the TRIPS Agreement in general[258]. In this analysis, the Panel placed emphasis on Articles 7 and 8 of the TRIPS Agreement as they lay down the general objectives and principles of the agreement[259]. It found that the objectives identified in Art. 8.1 could be a guidance on what types of "societal interests" may constitute grounds for a member state to justify its encumbrance under Art. 20[260]. Within this broader context, the Panel pointed out that protection of public health is unquestionably a recognized societal interest[261]. The Panel further found guidance in Art. 5 of the Doha Declaration which requires reading of TRIPS Agreement in light of its objectives and principles[262]. Together with its reading of the objectives and principles of the TRIPS Agreement, the Panel assessed the concept of "legitimate interests" under Art. 17 as well as the previous WTO jurisprudence, and concluded that:

> *"Article 20 reflects the balance intended by the drafters of the TRIPS Agreement between the existence of a legitimate interest of trademark owners in using their trademarks in the marketplace, and the right of WTO Members to adopt measures*

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[257] Panel Report, paras. 7.2424-2425.

[258] Panel Report, paras. 7.2395-2396.

[259] Panel Report, paras. 7.2399-2406.

[260] Panel Report, para. 7.2406.

[261] Ibid.

[262] Panel Report, paras. 7.2407-2411. See World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN (01)/DEC/1, 41 ILM 746 (2002) ("Doha Declaration").

for the protection of certain societal interests that may adversely affect such use.[263]*"*.

In conjunction with this conclusion, the Panel determined three factors that needed to be evaluated in assessing the unjustifiability of a State's actions under Art. 20, as follows:

"the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function; the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and whether these reasons provide sufficient support for the resulting encumbrance.[264]*"*.

Before analyzing these questions, the Panel first considered whether the TPP measures were *per se* unjustifiable. The Panel disagreed with Complainants' view that the "unjustifiability of requirements" should be evaluated considering each individual trademark and their specific features, thus it made its assessment on the whole class of trademarks and found that the plain packaging was not *per se* contrary to Art. 20[265].

When considering the "nature and extent of the encumbrance" imposed by plain packaging measures, the Panel recognized "the legitimacy of the trademark owners' interest in using its trademark for various purposes" such as indicating source and

[263] Panel Report, para. 7.2429.

[264] Panel Report, para. 7.2430.

[265] Panel Report, paras. 7.2432-2508.

transmitting benefits of the product[266]. With regards to the extent of the measures' effect on the use of trademarks, the Panel acknowledged that they prevent tobacco-related trademark owners from "extracting economic value from any design features of its trademark through its use in the course of trade" by prohibiting the use of any design features of trademarks[267]. Banning the use of all figurative trademarks, along with differentiating elements of composite and word marks imposed by TPP measures were accordingly found "far-reaching in terms of the trademark owner's expected possibilities to extract economic value from the use of such features.[268]". Nevertheless, the Panel did not find sufficient evidence to suggest that the measures prevented the owners of trademarks from using them for the main purposes of indicating source, based on the fact that they are still permitted to use words, including brand and variant names, capable of distinguishing tobacco products from each other[269].

With regards to the basis for the adoption of the trademark requirements, the Panel made reference to its earlier findings on the arguments under Art. 2.2 of the TBT Agreement in which it recognized the legitimate objectives pursued by Australia in adopting the subject measures, which is "to improve public health by reducing the use of, and exposure to tobacco products". In line with Australia's statements, the Panel accepted that the prohibitions on the use of trademarks were an integral part of the TPP measures that were adopted with this very purpose[270]. Furthermore, Australia's goal of performing

[266] Panel Report, para. 7.2562.

[267] Panel Report, para. 7.2569.

[268] Ibid.

[269] Panel Report, para. 7.2570.

[270] Panel Report, para. 7.2586.

its obligations under the FCTC as stated in the TPP Act and its Explanatory Memorandum were pointed out by the Panel, as well as how the adoption of plain packaging reflects the guidelines related to Art. 11 and Art. 13[271]. More importantly, the Panel took note of the comprehensive range of tobacco control measures adopted in the subject country, and how plain packaging fits into the general context of its tobacco control policies.

Having established the two issues discussed above, the Panel then considered whether the mentioned objectives of Australia provides sufficient grounds for plain packaging's effects on trademarks. In its analysis, the Panel underlined the gravity of the global public health problem caused by tobacco use, and mentioned that plain packaging were applied to address this exceptionally grave problem[272]. The Panel again placed emphasis on the fact that plain packaging was integrated into the overall TPP measures that worked jointly with other measures implemented by Australia. The Panel found that, as an integral part of the overall tobacco control measures, the prohibitions on the use of trademarks are "capable of contributing, and in fact do contribute" to Australia's objective to improve public health. The Panel found this fact to provide basis for the implementation of plain packaging which encumbrances of the use of trademarks[273]. Also referring to the evidence that demonstrates how the elimination of design features on tobacco products and packaging in fact reduce the appeal of them and increase the effectiveness of health warnings, the Panel found justification in prohibiting the use of certain trademarks because they were applied "as part of the overall standardization of

[271] Panel Report, para. 7.2589.

[272] Panel Report, para. 7.2592.

[273] Ibid.

retail packaging and the products themselves[274]". In other words, the fact that encumbrance on the use of trademarks was only one aspect of plain packaging, which standardizes many features of the packaging and products other than trademarks, was particularly considered by the Panel. The Panel also noted here that the measures applied by Australia in order to improve public health are line with its international commitments under the FCTC[275]. Finally, the Panel considered the Complainants' arguments that the availability of alternative measures that would contribute to Australia's objectives prove the adoption of plain packaging unjustifiable. As discussed earlier, the Panel had already considered the alternative measures put forward in the dispute and found that none of them were capable of making a contribution to the mentioned objectives similar to that of plain packaging. The Panel found that those earlier findings were also relevant for the consideration of these arguments, and therefore rejected them[276]. Against these findings, the Panel found that plain packaging did not "unjustifiably" encumber the use of trademarks in trade, and Australia did not "act beyond the bounds the latitude available to it" under Art. 20[277].

[274] Panel Report, para. 7.2593.

[275] Panel Report, para. 7.2596.

[276] Panel Report, para. 7.2600.

[277] Panel Report, para. 7.2604.

f. Article 2.1 of the TRIPS Agreement in Conjunction with Article 10bis of the Paris Convention

The Panel then considered the claims concerning the TRIPS Agreement provisions on unfair competition. Subject provision obliges member states to assure effective protection against unfair competition[278]. The complainants argued that plain packaging was incompatible with Australia's obligations under this provision because its implementation lead to "a situation of unfair competition" and the subject measures compel acts of unfair competition prohibited under the third paragraph of Art. 10bis[279].

Firstly, the Panel established that the provision only refers to acts of unfair competition conducted by market actors, and does not cover regulatory acts of a member state or "the regulatory environment within which the market operates"[280]. The Panel thus found that plain packaging itself does not constitute an act of competition in the context of related provision. Thereafter, the Panel analyzed whether Australia compelled market actors to engage in such acts by implementing plain packaging. The complainants' allegations as analyzed by the Panel were that the actors in the Australian tobacco market were indeed compelled to: "engage in acts of unfair competition by creating confusion" in the context of paragraph 3(1) of Art. 10bis; and "to engage in acts amounting to misleading indications or allegations" within the meaning of paragraph 3(3) of Art. 10bis. According to the Panel, the complainants failed to demonstrate neither of these allegations. In its analysis of these allegations, the Panel noted that plain packaging would

[278] Art. 2.1 was further explained above. See above § Ch. 2 (II)(D)(2)(a).

[279] Panel Report, para. 7.2685-2692.

[280] Panel Report, para. 7.2698.

not lead to confusion of consumers in the existence of the information allowed to be used on tobacco packaging such as the brand name, variant name and country of origin[281]. Such elements that are still allowed on the tobacco packaging was further recognized to be sufficient in communicating the commercial source of the products, i.e. providing the guarantee function on trademarks within the perspective of trademark protection[282]. The Panel emphasized that plain packaging protects the consumer's interest in not differentiating products and not being misled about the products' characteristics by allowing the use of brand and variant names, as well as protecting "the consumer's interest in not being misled about the harmful effects of smoking"[283]. Complainants' arguments concerning the misleading indications or allegations were further dismissed by the Panel because the measure does not mislead consumers "*in any way*" concerning characteristics of the tobacco products; or mislead them to think that all tobacco products have the same characteristics or source[284].

g. Article 22.2(b) of the TRIPS Agreement

Next, the complainants' claims with regards to the protection of geographical indications (GIs) were addressed by the Panel. Art. 22.2(b) obliges member states to provide protection for GIs against unfair competition as provided in the afore-mentioned

[281] Panel Report, para. 7.2721-2724.

[282] Panel Report, para. 7.2761.

[283] Panel Report, para. 7.2763.

[284] Panel Report, paras. 7.2759-2765.

provisions[285]. As such, the complainants put forward very similar arguments related to Art.10bis of the Paris Convention. Since certain GIs are used on tobacco products, particularly cigars that originate from Cuba, the complainants argued that the adoption of plain packaging "skewed the conditions of competition[286]". In light of its foregoing findings with regards to unfair competition, the Panel rejected that Australia failed to "provide the legal means to prevent acts of unfair competition" concerning GIs, therefore found no breach of Art. 22.2(b) as well[287].

h. Article 24.3 of the TRIPS Agreement

Under Art. 24.3, member states undertake not to diminish the protection of GIs that were provided in their countries prior to the effectiveness of the agreement[288]. The complainants contended that the protection of GIs under Australia's national law that was in place prior to the date of entry into force was annihilated consequent to the adoption of plain packaging, which resulted in violation of Art. 24.3[289]. The Panel examined the

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[285] Art. 22(2)(b) reads as follows: *"In respect of geographical indications, Members shall provide the legal means for interested parties to prevent: (...) (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967)."*

[286] Panel Report, para. 7.2857.

[287] Panel Report, paras. 7.2869-2872.

[288] Art. 24.3 of the TRIPS Agreement reads as follows:

"In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement."

[289] Panel Report, paras. 2873-2874. The agreement's date of entry into force in Australia was 1 January 1995,

remedies provided under Australia's domestic law concerning the GIs both in general and specifically in respect of "Habanos" as argued by Cuba, and found that the mentioned legal remedies do not entail a right to use GIs. Accordingly, the Panel rejected the claims under Art. 24.3 as well on the basis that the mentioned legal remedies that were available when the TRIPS Agreement entered into force in Australia were not diminished due the TPP measures[290].

i. Overall Conclusion on the TRIPS Agreement

The Panel ultimately dismissed all afore-mentioned claims and found that plain packaging as adopted by Australia did not violate the TRIPS Agreement. The most significant argument presented by the complainants were made under Art. 20, because it explicitly governs the use of a trademark. On the other hand, we believe that other claims based on the use of a trademark under articles 15 and 16 were structured by way of interpreting the relevant provisions beyond the purposes of the TRIPS Agreement, as suggested by Kaya[291]. With regards to plain packaging's consistency with Art. 20, the Panel established that implementation of plain packaging is a "special requirement" that encumbered the use of trademarks in the course of trade within the meaning of Art. 20. Nevertheless, taking societal interests in fulfilling its objectives into account, the Panel considered that it was justifiable. The Panel relied on the general purposes of the TRIPS Agreement when reaching this conclusion and gave weight to the public interest pursued by Australia against the interests of the tobacco-related trademark owners.

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[290] Panel Report, paras. 2956-2959.

[291] Kaya T., Düz Paketleme, p. 1068.

4- Concluding Remarks on the WTO Challenge

After reviewing voluminous evidence and claims submitted by the Parties to this dispute, as well as submissions made by third parties, the Panel reached the above-mentioned findings and upheld Australia's TPP measures. The concepts of "trade-restrictiveness" and "unjustifiability" were particularly at the fore-front of the claims and Panel's treatment of these two concepts were decisive on the compatibility of plain packaging in the context of WTO law. Under Art.2.2 of the TBT Agreement, the Panel concluded that plain packaging restricts trade indeed. Nevertheless, Australia was not found to violate this provision. Similarly, plain packaging was found to encumber the use of trademarks as prescribed under Art. 20 of the TRIPS Agreement, but the Panel found no violation of this article either because the adoption of them were found justifiable. The findings of the Panel related to both of these provisions give weight to purposes of plain packaging as stated in the Australian legislation. Acknowledging the legitimate interest of Australia in adopting measures with the purpose of reducing smoking prevalence, the Panel was persuaded that plain packaging can and does serve its purposes in contributing to this objective. In its analysis of both of the mentioned provisions, the legitimate interest of Australia in implementing plain packaging for reducing smoking prevalence, and consequently improving public health were considered important by the Panel. One may argue that, the Panel's decision reflects the regulatory discretion held by the member states in adopting measures that have an effect on trade protected by WTO law, for purposes that serve societal interests such as improvement of public health.

The second objective pursued by Australia which is to perform its obligations under the FCTC were affirmed by the Panel as well. Even though Panel disagreed with Australia's argument that FCTC and its guidelines constitute relevant international

standards as per the TBT Agreement, that finding did not ultimately lead to a negative decision against Australia. On the other hand, the WHO and the FCTC Secretariat were invited to submit additional documents concerning the guidelines and any preparatory materials considered by COP in the adoption phase. In its report, it indeed relied on the information provided by them, including the scientific and technical evidence. Notably, the Panel also referred to the relevant FCTC provisions and guidelines in various findings[292].

On the other hand, the Panel's interpretation of Art. 20 of the TRIPS Agreement in terms of the rights conferred to trademark owners were highly anticipated. In fact, the complainants' also argued that articles 15 and 16 implicitly required member states to allow trademark use. The Panel, however, did not agree with the complainants' and tobacco industry's argument that the provisions of the TRIPS Agreement obliges member states to provide trademark owners a right to use their trademarks, or a minimum opportunity to use them, neither expressly nor implicitly. According to the Panel, the exclusive right conferred by Art. 20 of the TRIPS Agreement did not extend beyond a negative right. Remarkably, the Panel put further emphasis on the fact that the use of trademarks is not entirely prohibited on tobacco packaging, although it prohibits the use of figurative trademarks that have been used on tobacco products. The use of simple and standardized word marks as required by the TPP measures were found to be sufficient for the trademarks to serve their functions such as indicating source and distinguishing the products.

[292] A list of the references made to provisions of the FCTC and its guidelines can be found in Gruszczynski L./ Melillo M., The FCTC and its Role in WTO Law: Some Remarks on the WTO Plain Packaging Report, European Journal of Risk Regulation, 9(3), 2018, pp. 564-574, at p. 572.

As noted earlier, the Panel Report was appealed by Honduras and Dominican Republic. The appeals will be reviewed by the Appellate Body under Art. 17 of the DSU[293]. In its written communication concerning the appeals, the Appellate Body announced that it will be unable to conduct its review within the periods indicated under the DSU due to the "exceptional size and complexity of the consolidated proceedings" as well as "the considerable volume of the panel record and the size of the panel report, the number of issues appealed, and the many complex aspects of these appellate proceedings[294]". On the other hand, United States' ongoing blockage of member appointments to the Appellate Body is contributing to the delays in the Appellate Body's functioning[295]. Therefore, it is still not clear when the appeals will be reviewed at the time of writing.

All in all, the Panel dismissed all of the claims made by the complainants concerning the TPP measures' consistency with the WTO law. Concerning the conflicting balance between the legitimate interests of private right holders and WTO members right to regulate measures in the public interest, the Panel Report gives weight to states'

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[293] On 5 September 2018, the Appellate Body decided to consolidate the appeals of Honduras and Dominican Republic

[294] WTO, Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging: Communication from the Appellate Body, WTO Docs WT/DS435/24, WT/DS441/25 (20 September 2018). Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/435-24.pdf> (last accessed 30.12.2019)

[295] Voon T.: Third Strike: The WTO Panel Reports Upholding Australia's Tobacco Plain Packaging Scheme, The Journal of World Investment & Trade (20), 2019, pp. 146-184, at p. 6-7; Kaya T., Düz Paketleme, p. 1072.

regulatory discretion in adopting measures for the public interest. This outcome may assure the countries that are willing to regulate measures for the public interest while complying with its obligations under international trade agreements. However, the delay in the Appellate Body's decision may result in the regulatory chilling effect to last a while longer.

III. URUGUAY

Uruguay has been a country with high smoking rates, where the deaths linked to tobacco-related diseases have amounted to 15% of all deaths as of 2009[296]. Notwithstanding the health concerns, the devastating effects of tobacco consumption and exposure have been found to be a significant strain on the country's economy due to the health costs, as well as the costs to sustain the smoking habit. Against this backdrop, Uruguay has been among the pioneering states with regards to implementing strong policies against tobacco in 2000's. Especially after the election of President Tabaré Vázquez, an oncologist in his earlier career, Uruguay has adopted series of regulatory measures as part of its Tobacco Control Program. Among others, two of the tobacco control measures caused a lot of controversy and was challenged by tobacco companies in domestic courts and international arbitration, neither of which managed to prevail.

Even though the challenged legislation of Uruguay did not mandate plain packaging, the regulations introduced some forms of standardization of tobacco products

[296] Written Submission by the Pan American Health Organization, 6 March 2015, available at: <https://www.paho.org/hq/dmdocuments/2016/Uruguay-amicus-6-March-15----FINAL.pdf> (last accessed 30.12.2019)

and packaging. The arbitration case brought by tobacco companies and the award dismissing all of their claims will be discussed for the purposes of this study, as the arbitral tribunal exercised jurisdiction and considered the merits of the dispute, unlike the case against Australia.

A. CHALLENGED MEASURES IN THE URUGUAYAN LEGISLATION

1. The Single Presentation Regulation

The so-called Single Presentation Regulation (SPR) was issued by the Ministry of Public Health of Uruguay in August 2008[297]. The SPR built upon the pre-existing Uruguayan Law which prohibited the tobacco packages and labels that could fabricate a misleading impression regarding the features, health effects, risks or emissions of tobacco products, in a false, wrong or misleading way[298]. The mentioned prohibition extends to the use of all trademarks or brands as well, so that the tobacco companies were restrained from using variant names such as "light" or "mild". With the adoption of the SPR, each brand was required to have a single presentation, so that each tobacco brand could be represented with only one variant.

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[297] Ordinance No 514 (Uruguay), issued 18 August 2009, entered into force 14 February 2010, Ministerio de Salud Pública.

[298] Law 18.256 (Uruguay) Article 8, implemented 6 March 2008; signed by Presidential Decree 284/008 9 June 2008.

2. The 80/80 Regulation

The so called 80/80 Regulation was enacted through the Presidential Decree 287/009[299]. With this regulation, the size of mandatory health warnings was increased to cover 80% of the lower part of each of the main sides of the tobacco packaging, from 50% which was required by the pre-existing Uruguayan Law. The health warnings were required to contain graphic images prescribed by the Ordinance No. 514.

B. INVESTMENT ARBITRATION

1. Commencement of Arbitration and Claims Against Uruguay

By virtue of the BIT signed between Uruguay and Switzerland, the Swiss subsidiary of the Philip Morris International, Inc., along with other affiliated private entities, filed a Request for Arbitration in ICSID against Uruguay on 19 February 2010[300]. The claim was registered in ICSID and an arbitral tribunal was constituted for the settlement of the dispute arising from Uruguay's adoption of the above-mentioned regulations[301]. Similar to the allegations made against Australia concerning their plain

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[299] Presidential Decree No 287/009 (Uruguay), promulgated on 15 June 2009, entered into force on 12 December 2009, Presidencia de la República Oriental de Uruguay.

[300] Agreement between the Swiss Confederation and the Oriental Republic of Uruguay concerning the Reciprocal Promotion and Protection of Investments, 1976 UNTS 413 (signed and entered into force 7 October 1988).

[301] FTR Holdings SA (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, registered 26 March 2010.

packaging laws, claimants alleged that the tobacco control measures as adopted through the above-mentioned regulations were in breach of Uruguay's obligations set out in the BIT in its treatment of the claimants' investments, i.e. their trademarks. For relief, the claimants sought either the withdrawal of the challenged regulations and an award of damages incurred until the withdrawal; or alternatively an award of at least 22.267 million USD plus compound interest, along with the fees and expenses in connection with the arbitration.

The Switzerland – Uruguay BIT can be described as a conventional treaty which incorporates typical provisions inherent in investment treaties. It does not involve interpretative statements or exception provisions that are included in recent modern treaties for the purposes of protecting states' authority to regulate for public interest[302]. In the absence of such provisions, the claimants' alleged that Uruguay's challenged measures violated five of Uruguay's obligations set out under the BIT. Two of those claims are directly related to intellectual property rights, which are to refrain from acts of expropriation (Art. 5); and to respect commitments made by the Host State regarding investments of Swiss investors (Art. 11)[303]. Two of the other substantive claims are related to Uruguay's obligations to provide fair and equitable treatment (Art. 3(2)); and not to impair the use of investments (Art. 3(1)). Lastly, the claimants alleged that they suffered from denial of justice through Uruguay's judicial system when handling the

(Hereinafter referred to as "PM v Uruguay")

[302] Yang, P.: The Margin of Appreciation Debate over Novel Cigarette Packaging Regulations in Philip Morris v. Uruguay, Brill Open Law, 1(1), 2018, pp. 91-111, at p. 98.

[303] Gervais D./Doster J.: Investment Treaties and Intellectual Property: Eli Lilly v. Canada and Phillip Morris v. Uruguay, Vanderbilt Law Research Paper No. 18-38, p. 5.

challenges made against the related measures in the domestic courts. Below, we will briefly discuss the Tribunal's analysis of the mentioned claims and particularly give weight to claims in relation to expropriation and FET due to their significance.

2. Decision of the Arbitral Tribunal and its Analysis on the Claims

Before addressing the merits of the claim, the Arbitral Tribunal considered the jurisdiction of ICSID and its own competence in the case against Uruguay. Having decided that the relevant requirements under ICSID Convention and the Switzerland-Uruguay BIT had been met, the Arbitral Tribunal found jurisdiction in the case against Uruguay and analyzed the merits of the claim, contrary to the case against Australia[304]. In doing so, the Tribunal rejected Uruguay's objections based on the arguments that the BIT excludes public health measures form the scope of protection afforded to investors; and that the tobacco companies' activities in Uruguay should not be considered as "*investments*" under Art. 25 of the ICSID Convention.

a. Expropriation under Article 5 of the BIT

BIT's typically contain a clause which ensures the Host State to not expropriate an investor's property without paying a prompt, adequate and effective compensation in return[305]. This includes both acts of direct expropriation where the State directly takes the

[304] PM v Uruguay, Decision on Jurisdiction (2 July 2013).

[305] Weiler T.: An Analysis of Tobacco Control Measures in the Context of International Investment Law, Report #1 for Physicians for a Smoke Free Canada, available at:

ownership of the investment; and indirect expropriation where State's actions lead to an effective deprivation in investors use of or enjoyment of the investment[306]. Art. 5 of the Switzerland-Uruguay BIT entails a typical expropriation clause which was violated according to the Claimants[307].

The Claimants argued that, by way of adopting the challenged measures, Uruguay indirectly expropriated seven of Abal's variants sold in Uruguay, along with "*the goodwill and the legal rights deriving from the associated intellectual property*"[308]. This claim was based on the fact that Abal had to eliminate seven of its thirteen variants from the Uruguayan market once the SPR became effective[309]. In addition to the loss of the value of trademarks that were associated with the eliminated variants, the company argued that it suffered a considerable loss of sales to support their claims. It was

<https://www.investorstatelawguide.com/documents/documents/IC-0130-02.pdf>, p. 16. (last accessed: 01.09.2019)

[306] Ibid.

[307] Mcgrady B.: Implications of Ongoing Trade and Investment Disputes Concerning Tobacco: Philip Morris v Uruguay, In Voon T./Liberman J. (eds), Public Health and Plain Packaging of Cigarettes, UK 2012 ("Implications"), p. 182; Switzerland – Uruguay BIT, Article 5 states:

"Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken for the public benefit as established by law, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation."

[308] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 ("PM v Uruguay, Award"), para. 193.

[309]PM v Uruguay, Award, para. 144. The variants that were eliminated are as follows: Marlboro Gold, Marlboro Blue, Marlboro Fresh Mint, Fiesta Blue, Fiesta 50/50, Phillip Morris Blue, and Premier.

contended that such losses must be compensated by Uruguay, regardless of the public purpose underlying the challenged measures. In support of this argument, it was further pointed out that there were no "carve-outs, exceptions or saving presumptions for public health or other regulatory actions," provided in the Switzerland-Uruguay BIT that would exempt Uruguay from the expropriation clause[310]. The Claimants argued that questions regarding whether Uruguay acquired a benefit from expropriating measures; or the Claimants' business went defunct due to the measures were not relevant for their expropriation claim to be valid[311].

In its pleadings, the Claimants acknowledged the powers of Uruguay pursuant to the police powers doctrine that had been established in the case law[312]. Nevertheless, it was contended that the challenged measures did not comply with the police powers doctrine based on the allegations made with regards to the effectiveness, reasonability and proportionality of the measures[313]. Furthermore, the Claimants argued that trademarks are a form of property and their use must be protected according to the literal

[310] PM v Uruguay, Award, para. 184.

[311] PM v Uruguay, Award, para. 185.

[312] See e.g. Chemtura Corporation v. Government of Canada, NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para.266; and Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras. 255, 260, 262. According to the Police powers doctrine, *bona fide* regulation of a state for public purposes could not be considered expropriatory, hence the state is not required to pay compensation to the investor. For further information on the doctrine, see Zamir N.: The Police Powers Doctrine in International Investment Law, Manchester Journal of International Economic Law, Vol. 14, No. 3, 2017; Nalçacıoğlu Erden H.Z., Milletlerarası Yatırım Hukukunda Dolaylı Kamulaştırma, pp. 330-365.

[313]PM v Uruguay, Award, para. 199.

wording of the Uruguayan Constitution and other relevant legislation[314]. Accordingly, the limitation on the use of trademarks mandated by the SPR purportedly prevented the Claimants from enjoying their constitutional rights.

When analyzing the expropriation claim, the Tribunal first considered the central issue of whether a trademark confers a right to use or just to prevent others from using it. This issue regarding the inherent nature of the trademark right spans various issues disputed between Claimants and Uruguay[315]. Whilst the parties' assertions were focused on the contradiction between the right to use and right to prevent others, the Tribunal adopted another perspective and considered whether a trademark grants absolute or exclusive right to use[316]. By reference to the findings in the expert opinions submitted by Uruguay, it was noted by the Tribunal that there is no "absolute right to use" expressly stated in the relevant international instruments as well as the Uruguayan Law[317]. Additionally, the Tribunal pointed out that there shall be *"a reasonable expectation of regulation such that no absolute right to use trademarks can exist"*, because otherwise it would prevent States from regulating any trademarked product, regardless of any public policy concerns[318]. Thus, The Tribunal concluded that:

> *"under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only*

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[314] PM v Uruguay, Award, para. 208, 209.

[315] Gervais/Doster, p. 5.

[316] PM v Uruguay, Award, para. 267.

[317] The Tribunal referred here to the Paris Convention, TRIPS Agreement and the MERCOSOUR Protocol.

[318] PM v Uruguay, Award, para. 269.

the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power[319]*."*

The Tribunal then considered whether the challenged measures amounted to indirect expropriation. According to the Tribunal, for an "indirect expropriation" to be established in the subject dispute, the 80/80 Regulation and the SPR's impact on the investor's rights must had "*a major adverse impact on the Claimants' investments*[320]". A standard set out in the previous investment tribunal decisions that require the State's measure to constitute a "substantial deprivation" of investments value, use or enjoyment was adopted by the Tribunal concerning this issue[321]. Concerning the 80/80 Regulation, the Tribunal ruled that the measures did not even amount to a "*prima facie* case of indirect expropriation", because the tobacco companies were still allowed to use 20% of the front and back surfaces of the packaging, on which their trademarks continued to appear recognizable as such[322]. Concerning the SPR, whilst accepting that seven of claimants' thirteen trademarks were "effectively banned" due to the regulation, the Tribunal ruled that sufficient value remained in the investments of the Claimants even after the mentioned bans, and found that the SPR did not constitute an indirect expropriation as well[323]. When arriving this conclusion, the Tribunal considered the Claimants' assets as

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[319] PM v Uruguay, Award, para. 271.

[320] PM v Uruguay, Award, para. 192.

[321] See e.g. Telenor Mobile Communications AS v Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 Sep. 2006; Metalclad Corporation v United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Interim Award, 26 June 2000, paras. 96, 102.

[322] PM v Uruguay, Award, para. 276.

[323] PM v Uruguay, Award, para. 286.

a whole rather than having individual trademarks that were no longer in use due to the SPR as separate investments[324]. To conclude, Uruguay's adoption of neither of the subject measures amounted to an act of expropriation according to the Tribunal.

In spite of ruling that the regulations did not expropriate the tobacco companies' investments, the Tribunal addressed one final issue anyway and considered whether the implementation of the challenged measures was a "valid exercise of Uruguay's police powers". The Tribunal set forth three conditions in order for the adoption of the measures to be considered within the "*police powers doctrine*". In that vein, the regulations had to be adopted "*bona fide* for the purpose of protecting public welfare", had to be "non-discriminatory" and "proportionate"[325]. Concerning the bona fide purpose of the regulations, the Tribunal pointed out to the national and international obligations of Uruguay to protect public health and ruled that the regulations were adopted in order to fulfill such obligations[326]. After reviewing a number of sources such as the Amicus Curiae submitted by the WHO and PAHO, the Tribunal further concluded that the measures were non-discriminatory and proportionate[327]. Instead, the Tribunal found them to be "potentially effective" for the purposes of protecting public health. The difficulty in evaluating the effects of each measure were acknowledged by the Tribunal, because they were adopted as part of a broader regime of tobacco control. Nonetheless, the declining numbers of smoking in Uruguay, particularly among the young smokers, gave the benefit

[324] PM v Uruguay, Award, para. 283.

[325] PM v Uruguay, Award, para. 305.

[326] PM v Uruguay, Award, para. 306.

[327] Ibid. The reasoning for this conclusion was further explored with regards to the second and third claims under Article 3(1) and 3(2) of the BIT.

of the doubt in favor of Uruguay in relation to the measures' contribution to their achievements. Overall, as the adoption of the regulations was considered a valid exercise of Uruguay's police powers, the Tribunal further supported its above conclusions concerning the dismissal of the expropriation claim.

b. Denial of Fair and Equitable Treatment under Article 3(2) of the BIT

The fair and equitable treatment standard (FET) is one of the typical standards that obliges states to accord to its investors under most BIT's, and stands out as "the most frequently invoked standard in international investment disputes"[328]. The Claimants submitted that Uruguay violated the FET standard provided under Art. 3(2) of the BIT by adopting the subject measures.

First of all, the Claimants contended that the challenged measures violated the FET standard because they were "arbitrary" on the basis of inflicting damage on the tobacco companies' investments "without serving any apparent legitimate purpose"[329]. It was argued that the rationality of the measure, the genuine public purpose behind it and a reasonable connection between said purpose as well as the utility of the those measures must be examined by the Tribunal pursuant to the case law concerning the FET standard[330]. In that vein, the Claimants questioned the connection between Uruguay's rationale for adopting the challenged regulations and the measures that damaged their investments. They further questioned the empirical evidence and scientific research

[328] See Dolzer R./Schreuer C.: Principles of International Investment Law, NY 2008, pp. 119-149.

[329] PM v Uruguay, Award, para. 325.

[330] PM v Uruguay, Award, para. 326.

concerning the effectiveness and necessity of the measures. At the same time, it was argued that there was already public awareness regarding the hazards of smoking. Hence, enlarging the size of mandatory warnings could not be justified with Uruguay's rationale of adopting the measure, which were to avoid misleading the consumers on health risks and to increase public awareness[331].

Furthermore, the Claimants contended that their legitimate expectations when investing in Uruguay must be preserved by the State in compliance with the FET standard. Allegedly, they made "substantial investments" in Uruguay depending on, among others, expectations that Uruguay would:

> *"(a) allow the Claimants to continue to deploy and capitalize on their brand assets; (b) refrain from imposing restrictive regulations without a well-reasoned, legitimate purpose; (c) respect the Claimants' intellectual property rights; and (d) ensure that the Claimants had access to a just, unbiased, and effective domestic court system[332]."*

By way of adopting the challenged regulations, Uruguayan Government purportedly "*eviscerated*" all of these expectations held by the tobacco companies' invested in Uruguay.

In addition, the Claimants argued that Uruguay's obligations under the FET Standard consisted of providing "a reasonably stable and predictable legal system". Claimants relied on an arbitral award against Ecuador in making this argument[333]. Whilst

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[331] PM v Uruguay, Award, para. 327.

[332] PM v Uruguay, Award, para. 341.

[333] See Occidental Exploration and Production Co. v. Republic of Ecuador, UNCITRAL, LCIA Case No. UN 3467, Final Award, 1 July 2004 (CLA-071), para. 191.

accepting the State's discretion to exercise powers to regulate, Claimants contended that the challenged regulations were "outside of the acceptable margin of change"[334].

Uruguay rejected the above-mentioned arguments and submitted that the challenged regulations were adopted in good faith, based on scientific evidence, in line with Uruguay's public health objectives to reduce smoking prevalence, and with a non-discriminatory manner. The majority of the Tribunal sided with Uruguay and ruled that the measures were reasonably connected with public health objectives; and it found that they were not "discriminatory, arbitrary, grossly unfair, unjust or disproportionate". In its analysis of the adoption of SPR on this matter, the Tribunal opined that it did not need to decide on the effectiveness of the measure, as it was established that the measure was "reasonable" in addressing real public health concerns, which were the public misperceptions about tobacco safety and misleading effects of packaging[335]. The Tribunal noted that: although the SPR precluded the concurrent use of certain trademarks, it did not deprive the tobacco companies of the negative rights attached to trademarks, emphasizing again its perspective on the non-absolute exclusive nature of trademark rights[336]. Similarly, concerning the 80/80 Regulation, the Tribunal dismissed Claimants arguments against the effectiveness of the measure as it was found a reasonable exercise of the Uruguay's regulatory powers to address concerns related to public health.

Notably, in its analysis on the FET claim, the Tribunal emphasized Uruguay's efforts to carry out its obligations under the FCTC when it examined the reasonableness

[334] PM v Uruguay, Award, para. 346.

[335] PM v Uruguay, Award, para. 409.

[336] PM v Uruguay, Award, para. 409.

of both of the measures[337]. The importance of the FCTC was also displayed when the Uruguay successfully refuted tobacco companies' claims that the regulations were arbitrary because they lacked sufficient scientific support, as the Tribunal ruled Uruguay was not required to conduct additional studies, acknowledging that the WHO Guidelines are "evidence-based"[338]. It was no doubt an important source that the Tribunal relied on when establishing that the adoption of challenged regulations was "legislative policy decision taken against the background of a strong scientific consensus"[339]. Other sources that the Tribunal took notice of were the written submissions of WHO and PAHO in support of the tobacco control measures.

Particularly, the Tribunal made statements in favor of the States' discretion on regulating measures necessary to address public concerns, e.g. the protection of public health, when examining the arbitrariness of Uruguay's measures. It was noted that:

> *"The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health"*[340].

When concluding its analysis on the arbitrariness of the measures, the Tribunal reiterated its view on the State's discretion by saying:

> *"The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal (...) some limit had to be set, and the balance to be struck between conflicting consideration was very*

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[337] PM v Uruguay, Award, para. 401.

[338] PM v Uruguay, Award, para. 394.

[339] PM v Uruguay, Award, para. 418.

[340] PM v Uruguay, Award, para. 399.

largely a matter for the government"[341].

Most notably, the Tribunal made these assessments by means of applying the concept of "*margin of appreciation*", which was originally developed by the ECtHR[342].

The tribunal then analyzed the claims related to legitimate expectations of the Claimants and Uruguay's legal stability. Based on the fact that there were no specific commitments made by the state to the Claimants concerning tobacco control regulations, the Tribunal dismissed the claim related to legitimate expectations and the stability of the legal framework.

c. Impairment of Use and Enjoyment of Investments under Article 3(1) of the BIT

The Claimants further alleged that Uruguay violated its obligation "not to impair the use and enjoyment of investments" under Article 3(1) of the BIT[343]. It was claimed that the measures in the challenged regulations were "unreasonable" which resulted in the Claimants' losing the "use, enjoyment and extension of their investments in PMI's

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[341] PM v Uruguay, Award, para. 418. (emphasis added)

[342] For a detailed review of the Tribunal's application of margin of appreciation doctrine and its implications for investor-state disputes, see generally Yang.

[343] Switzerland – Uruguay BIT, Article 3(1) states:

"Each Contracting Party shall protect within its territory investments made in accordance with its legislation by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments."

portfolio of brands and IP[344].” Having established that the factual matrix and legal grounds pertaining to this claim and the claim concerning FET are similar, the Tribunal dismissed this claim with the same reasoning that it gave with respect to FET[345].

d. Failure to Observe Commitments as to the Use of Trademarks under Article 11 of the BIT

Article 11 of the Switzerland-Uruguay BIT provides that “*Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party*”. Claimants contended that the “commitments” provided in the said Article include Uruguay’s purported commitments to ensure the Claimants’ “full range of rights that trademark holders enjoy in Uruguay, including the right to use trademarks and the right to exclude others from doing so[346].” Having decided that trademarks did not grant an absolute right to use when considering the expropriation claim, the Tribunal ruled that no such commitments may be said to have been undertaken by Uruguay[347].

On the other hand, the Claimants submitted that Art. 11 should be interpreted as an “umbrella clause” for containing “the core components” of such a clause[348]. By way of this, the Claimants aimed to bring the international agreements that govern trademarks

[344] PM v Uruguay, Award, para. 483.

[345] PM v Uruguay, Award, para. 444-446.

[346] PM v Uruguay, Award, para. 450.

[347] PM v Uruguay, Award, para. 458.

[348] PM v Uruguay, Award, para. 459.

within the applicable law of the arbitration[349]. Noting that clauses in other BIT's with similar wording to that of Art. 11 have subject of various arbitral awards and extensive academic commentary, the Tribunal sided with the view that Art. 11 can be interpreted as an "umbrella clause", at least for contractual claims[350]. However, the claim was dismissed on the ground that a trademark is not a commitment of any kind within the intended scope of Art. 11. This conclusion was drawn by means of relying on the view expressed in other investment tribunals that such clauses similar to Article 11 do not refer to general commitments imposed on the Host State, but rather specific ones made to private parties that invested in such country[351].

e. Denial of Justice

Lastly, as part of the claim related to the FET standard, the Tribunal analyzed whether Uruguay committed denial of justice through the proceedings in the domestic courts which ultimately led to dismissal of the Claimants' claims against the validity of challenged regulations. The Claimants argued that they were denied justice by the Uruguayan judiciary system with regards to the verdict of Uruguay's SCJ on the constitutionality of Law 18,256 and the TCA decision on the validity of the 80/80

[349] Namely the Paris Convention and TRIPS Agreement. See Mcgrady, Implications, p. 198.

[350] PM v Uruguay, Award, para. 467-472.

[351] The Tribunal referred to the following tribunal awards in its reasoning: Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005; SGS v. Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.

Regulation[352]. The denial of justice claim was based on two allegations. First one was that the decisions of the two courts with regards to 80/80 Regulation were contradictory; and the second was the SCJ rejected the claim "*as presented and litigated by another tobacco company*" in an entirely different proceeding, British American Tobacco, while disregarding Abal's claims in its decision.

When discussing the standard for a denial of justice claim, the Tribunal established the undisputed fact that for a State to be liable of denial of justice, the claim shall be grounded on "*fundamentally unfair judicial proceedings at the issuance of which the claimant is considered to have exhausted all available local remedies*"[353]. The dispute between the Parties on the denial of justice claim was mainly concerning the standard of proof and the necessary threshold. Citing the decision of a previous investment tribunal, the Tribunal sided with Uruguay' view on the higher standard which requires "fundamentally unfair proceedings and outrageously wrong, final and binding decisions[354]". Notably, the Tribunal maintained that "*arbitral tribunals are not courts of appeal*", when reiterating its reasons for requiring a high standard for establishing a denial of justice claim[355]. Against this background, even though the Tribunal agreed that two of the highest courts' decision involving the Claimants were contradictory; and there were "a number of procedural improprieties and a failure of form" in the TCA's decision concerning SPR; the majority of the Tribunal was not convinced that the proceedings

[352] Supreme Court of Justice Decision No. 1713 (10 November 2010) and Tribunal de lo Contencioso Administrativo ("TCA") Decision No. 512 (28 August 2012).

[353] PM v Uruguay, Award, para. 487.

[354] PM v Uruguay, Award, para. 498. Also see para. 569.

[355] PM v Uruguay, Award, para. 500.

carried out by the Uruguayan courts were "fundamentally unfair"; or their decisions were "outrageously wrong". Hence, denial of justice claim was dismissed as well. That being so, the Tribunal did not find it necessary to discuss the requirement of exhaustion of local remedies.

3. Concurring and Dissenting Opinion

One member of the Tribunal, Arbitrator appointed by the Claimants, Gary Born disagreed with the majority's reasoning and conclusions with regards to two of the foregoing claims[356]. Noting that he agreed with most of the Tribunal's conclusions, he drew a concurring and dissenting opinion on these two matters. Both of his reservations were concerned with the interpretation of Article 3 (2), namely the FET clause. First, he opined that contradictory interpretations of two of the Uruguay's high courts amounted to a denial of justice. Second, he found that adoption of the SPR was "arbitrary and disproportionate", thus it violated the FET standard. When considering this standard, he opposed the majority decision that found the concept of "*margin of appreciation*" applicable in an investor-state dispute.

[356] See PM v Uruguay, Award, Concurring and Dissenting Opinion, Mr. Gary Born, Arbitrator.

C. CONCLUDING REMARKS ON THE TRIBUNAL'S DECISION

As explained above, the challenged measures of Uruguay were not as restrictive as plain packaging, by way of allowing the use of trademarks on tobacco packs. Nevertheless, the claims brought by tobacco companies under the BIT resembled the claims against Australia's TPP measures, due to the similarities between the factual backgrounds of the cases. Both of the measures were adopted as part of the wider range of tobacco control policies for the purposes of improving public health by reducing smoking prevalence. They also constrained the use of IP owned by the tobacco companies. Against this background, Uruguay's victory in this arbitration dispute may be a reassurance for the countries that are willing to adopt plain packaging but refrain from doing so under the threat of investment arbitration claims.

The majority mainly drew up a two-prong test in evaluating the validity of regulatory measures: first, the objective of the measure must be legitimate; two, it must be "*capable of contributing to the achievement*" of the subject policy objective[357]. Advancement of public health by means of decreasing the smoking rates were deemed as legitimate objectives. The majority was also convinced that the measures had the potential to contribute to its objectives. The majority findings giving weight to margin of appreciation and "police powers" of the state in regulating public health measures are particularly encouraging in that vein. Furthermore, the Tribunal's consideration of FCTC being an "evidence-based" treaty, and ruling that Uruguay did not need to conduct further studies about the effectiveness or necessity of the contested measures is noteworthy. The

[357] Gervais, D.: Intellectual Property: A Beacon for Reform of Investor-State Dispute Settlement, Michigan Journal of International Law, 2009, pp. 289-325, at p. 303.

specific measures adopted by Uruguay which were novel and unprecedented, were not recommended under the FCTC. The fact that the guidelines related to the FCTC provisions expressly recommend plain packaging may imply that states' party to the FCTC can successfully defend arguments based on lack of sufficient evidence in relation to plain packaging measures.

Nevertheless, it should be noted that international arbitration decisions are not binding[358]. So if there is another investment treaty claim filed against a host state due to similar tobacco control measures, the tribunal would make an independent judgement based on the subject case and factual narrative. The inherent differences between the above-described Uruguayan measures and plain packaging might yield different results, considering that plain packaging eliminates the use of all registered tobacco trademarks (other than simple word marks), contrary to SPR which allows the use of regular trademarks per one brand. Furthermore, when dismissing the claim on expropriation, the Tribunal gave weight to the fact that the 80/80 Regulation allows for the use of conventional tobacco trademarks in the remaining 20% of the packaging surfaces. In the case of plain packaging, this interpretation will not stand. Finally, considering the controversy highlighted in the dissenting opinion of Born related to the scope of FET standard, one may argue that tobacco industry may not yet give up on their claims under international investment law.

[358] While there is no doctrine of precedent in international arbitration, arbitral tribunals in investment treaty cases sometimes rely on prior decisions. In fact, there are some arguments that investment tribunals should take into account their systemic obligations when considering the value of the precedents. See e.g. Kaufmann-Kohler G.: Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture, Arbitration International 23 (3), 2007, pp. 357–378.

§ CHAPTER THREE

THE PLAIN PACKAGING LEGISLATION IN TURKEY AND ITS COMPATIBILITY WITH THE LAW

I. INTRODUCTION

Turkish Republic has been amongst the leading countries in terms of adopting tobacco control measures since the 1990's. It was therefore no surprise when plain packaging rules were adopted by Turkey in 2019. While Turkey has stood out as a strong figure in the tobacco control community with its demonstrated commitment to fight against the epidemic, its history with tobacco production and relationship with the multinational tobacco companies presents an interesting two-sided case.

For the purposes of this thesis, we will first briefly provide an overview of tobacco's history in Turkey, by describing how the tobacco market progressed to its current state. We will then discuss the history of tobacco control policies in Turkey. Thereafter, the latest legislative amendments in tobacco control laws which introduced plain packaging will be taken at hand. Finally, we will examine the plain packaging rules in consideration of the main legal issues arose in the previously mentioned legal disputes.

II. OVERVIEW OF TURKEY WITHIN THE CONTEXT OF TOBACCO CONTROL

A. BRIEF HISTORY OF TOBACCO IN TURKEY

1. Early Years

Turkey has been renowned for its tobacco for centuries. Local farmers of Anatolia have been cultivating oriental-type tobacco for more than 400 years. Due to reasons such as the climate, condition of the soil and the know-how of the local farmers, the "Turkish Tobacco" has gained a reputation for itself as a very high quality product among tobacco types[359]. A significant portion of the oriental-type tobacco used worldwide have been produced in Turkey, hence Turkey has been an exporter of tobacco. Beginning from the 19th century, when the Ottoman Empire began imposing taxes on tobacco and prohibiting tobacco imports, it has been one of the most important revenue items for the country. Therefore, tobacco has had significant weight in the economy and politics of Turkey since then.

In the late 19th century, the Ottoman Empire formed a tobacco authority called Reji Administration vested with monopoly rights. The management rights of the Reji Administration were assigned to a French Association for more than 40 years in exchange of Ottoman Empire's debts. In the early years of the Turkish Republic, Reji was capitalized by the state and became an administration governing the state monopoly on

[359] Özkul I./Sarı Y.: Türkiye'de Tütün Sektörünün Durumu, Sorunları ve Çözüm Önerileri, 2. Ulusal İktisat Kongresi, İzmir 2008, p.3.

tobacco and tobacco products. This monopoly later became a part of Tekel which controlled cultivation, manufacturing, pricing and selling of tobacco and tobacco products. Starting from 1940, the state subsidized and supported cultivation of tobacco. All products cultivated by the farmers were purchased by Tekel on behalf of the state. The state monopoly lasted until 1980's in Turkey. In that period, tobacco cultivated in Turkey were used in all tobacco products manufactured and sold in Turkey, which were also exported[360].

2. Liberalization Movements

Tobacco and tobacco products were among the goods affected by the liberalization policies implemented by the Turkish government in 1980's. In 1984, the government permitted foreign parties to import tobacco products in Turkey. Initially, exclusive right to import, price and distribute such products imported by foreign companies remained in Tekel. Only two years later, Law No. 3291 was enacted which put an end to the state monopoly in tobacco and subsequently foreign companies were allowed to manufacture, distribute and market tobacco products in partnership with Tekel

[360] Although foreign tobacco products were not allowed, a significant amount of products that were illicitly traded in Turkey had been consumed by Turkish people by the 1980's. Public health experts have frequently raised serious allegations against the tobacco industry for deliberately ensuring the illicit trade. Purportedly, tobacco companies used this as a means for convincing national governments to allow importation of tobacco products, as well as familiarizing the population with their products. See e.g. Seydioğulları M.: Tütün Kontrolü ve Yasa Dışı Ticaret (Tobacco Control and Illicit Trade), Sürekli Tıp Eğitim Dergisi 25, 2016, pp. 27-35; Gültekin-Karakaş D.: Market Oriented Transformation of Tobacco Sector in Turkey, Turkish Thoracic Journal 15 (2), 2014, pp. 71-91, at p. 86.

under certain conditions by the Governmental Decree No. 10911. Consequently, multinational tobacco companies entered the Turkish market and started advertising and promoting their cigarettes in Turkey[361].

A new law was enacted in 1991 which allowed all local and foreign companies that manufacture large amounts of cigarettes to establish their own manufacturing facilities in Turkey and freely import and manufacture tobacco and tobacco products without the condition of partnering with Tekel. With this law, the multinational companies that fulfilled the condition of producing more than 2.000 tonnes were allowed to import and freely price their tobacco products. Consequently, Philip Morris, through the joint venture named PhilSa that was established in partnership with local conglomerate Sabancı, opened a cigarette factory in İzmir and began manufacturing. Likewise, R.J. Reynolds started manufacturing in İzmir that year, which was later acquired by JTI.

This transformation in the legislative environment paved the way for the multinational tobacco companies to significantly increase their shares in the Turkish market. Tekel's market share gradually declined as it was very hard to compete with multinational companies that use the latest technology; establish efficient distribution and marketing networks; and invest heavily in advertising and marketing[362]. By 2005, Tekel consequently lost its leading position in the tobacco market to PhilSa. Only in 15 years,

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[361] Bilir N./Özcebe H./Ergüder T./Mauer-Stender K.: Tobacco Control in Turkey - Story of Commitment and Leadership, 2012, WHO Europe, available at <http://www.euro.who.int/en/countries/turkey/publications/tobacco-control-in-turkey-story-of-commitment-and-leadership>, p. 9. (last accessed: 30.12.2019)

[362] Bilir N. et. al.: Tobacco Control in Turkey, Copenhagen 2009, WHO Europe, p. 39.

the share of the foreign companies in the Turkish tobacco market increased from 13% to almost 70%[363].

On the other hand, more and more tobacco have been imported to Turkey every year after the above-mentioned reforms were made in the tobacco legislation[364]. Furthermore, the "Tobacco Fund" which was established in 1986 with the aim of protecting local tobacco cultivation by imposing taxes on imported tobacco used in manufacturing was abolished by the government. The fund had served as a protection for the local tobacco. Concurrent with the transformation of the tobacco market, the tobacco fund taxes were gradually lowered and abolished by the government over the years.

During the economic crisis that Turkey suffered in 2001, a number of state-controlled enterprises were privatized in accordance with the Turkey's undertakings to the IMF. The privatization of Tekel and reforming of the tobacco market in the direction of liberalization was among Turkey's undertakings pursuant to the Standby Agreement signed with IMF. It was planned to gradually abolish policies for subsidizing local tobacco cultivation and remove state intervention in the tobacco market. Accordingly, Tekel was included into the privatization programme with the decision of High Council of Privatization on 5 February 2011.

There were many voices against the privatization of Tekel. Besides the Tekel workers and nongovernmental organizations that supported protection of local property, tobacco control advocates opposed the privatization of Tekel on various grounds as well. Nevertheless, the Bill numbered 4685 that aimed to privatize Tekel and govern the new

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[363] Ibid.

[364] The volume of Tekel's imports has increased from 610 tonnes in 1988 to approximately 67.000 tonnes in 2007. See Bilir et. al., p. 16.

structure of tobacco market was passed in the parliament in June 2001. Despite the veto of the President, the Bill was passed by the parliament without any changes and Law no. 4733 was put into effect on 9 January 2002.

As part of the said reform of the market, an autonomous public authority was established in 2002 under the name of "Tobacco and Alcohol Market Regulatory Authority" ("TAPDK"). TAPDK was given the power to regulate the tobacco market as well as to inspect the production and trading of tobacco and tobacco products, which were previously held by the state monopoly Tekel. Concurrently, Tekel was first transformed into a state enterprise and then into an incorporated company, which ultimately paved the way to its privatization[365]. After a few unsuccessful attempts, Tekel's tobacco department was finally sold to BAT in 2008 for 1.720 Million USD.

3. Current Situation and Dominance of Multinational Companies in the Tobacco Market

As mentioned earlier, tobacco cultivation has held a very important place in Turkey's economy for a long time. For more than 60 years, it was subsidized by the state. In that way, tobacco cultivation, which was traditionally carried out by many farmers in Anatolia, has been the main source of steady income and employment for a significant portion of families living in the rural areas. Furthermore, tobacco leaves cultivated in Turkey were exported worldwide, which sustained many local export companies.

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[365] For the process of Tekel's privatization, see Bor Ö.: Küreselleşme Sürecinde Türkiye'de Tütün / Tobacco in Turkey in the Process of Globalization, Mülkiye Dergisi 35 (270), 2013, pp. 65-92, at pp. 80-81.

Nevertheless, the described conditions in Turkey changed drastically within only few decades, due to the abovementioned transformation in state policy towards tobacco. The abolishment of state monopoly and series of legislative amendments that allowed multinational companies to enter the Turkish market and gradually liberated them to freely operate in production, distribution and sales have resulted in a market where the multinational companies hold the strings. After the change in 1991, the foreign companies were allowed to import and determine prices. The volume of imported tobacco increased each year, while the increase in the exports halted. Tekel has remained weaker in the free economy, where foreign companies with vast resources, latest technology and efficient networks had the upper hand.

After the reforms made in 2002 pursuant to Turkey's agreement with IMF, the state gradually stopped subsidizing tobacco cultivation. Along with other policies that fettered local farmers from cultivating tobacco such as the contract production model, a significant portion of farmers were forced to stop cultivating tobacco[366]. Furthermore, local oriental-type tobacco has been used in fewer blended cigarettes. As a result, number of tobacco exports fell rapidly each year while the imports and consumption rates have increased. Concurrently, by 2007, Turkey which had long been a net exporter of tobacco,

[366] Seydioğulları M.: Türkiye'de tütün üretimi ve tütüne alternatif politikalar üzerine değerlendirme, 2012, available at <http://www.ssuk.org.tr/savefiles/tutun_yretim_20_12_2012.doc> (last accessed: 30.12.2019) ("Türkiye'de Tütün Üretimi"), at p. 2; Legislative Decree No. 2001/2705 on Supporting Producers That Abandoned Tobacco Cultivation and Switched to Alternative Products, Official Gazette No. 24461, 13 July 2001. Also see Elbek O.: Tütünün Ekonomi Politiği, Bianet, 7 August 2010, available at <http://bianet.org/biamag/tarim/123970-tutunun-ekonomi-politigi%20-Biamag>. (last accessed: 30.12.2019)

become an importer of tobacco[367].

As described above, local tobacco cultivation and trade in Turkey has drastically decreased. While this can be considered as favorable within the context of tobacco control, it must be noted that the current situation was not created within the scope of tobacco control policies. As pointed out by Seydioğulları, the current picture is not a result of the tobacco control laws that were fully implemented by 2009, but rather is a result of globalization and privatization policies that went into effect in 1980's[368]. In fact, it can be argued that the mentioned transformations in the Turkish tobacco market has favored the multinational tobacco companies the most, while having negative consequences for the consumers and local producers in Turkey[369]. The state policies indeed caused the multinational companies to seize the pricing power in the Turkish market and multiply their sales, while leaving the local shareholders in a vulnerable position[370].

B. TOBACCO CONTROL POLICIES IN TURKEY AND THE HISTORY OF RELATED LEGISLATION

Before the 1980's, the only measures in Turkey against tobacco were smoking bans in certain public transportation vehicles, which were not fully implemented due to

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[367] Özkul, Sarı, p. 9.

[368] Seydioğulları, Türkiyede Tütün Üretimi, p. 5

[369] For a timeline showing the process of multinational tobacco companies gaining dominance in the Turkish market, see Gültekin-Karakaş, p. 80, figure 6.

[370] See Yavuz Y.: 16 Yılda Türkiye'nin En Önemli İhraç Ürününü Böyle Bitirdiler, Odatv (online article), 18 December 2018, available at <https://odatv.com/16-yilda-turkiyenin-en-onemli-ihrac-urununu-boyle-bitirdiler-18121807.html>. (last accessed: 30.12.2019)

lack of inspections and sanctioning mechanisms. Beginning from 1981, small textual health warnings stating "*hazardous to health*" on tobacco packaging were mandated. In 1988, the Ministry of Health launched a short term campaign that aimed to inform people on the harmful effects of smoking by printing posters in public places[371].

Notwithstanding the emergence of scientific evidence that stimulated efforts in tobacco control measures worldwide around the end of 1980's, Turkey's lack of demand reduction measures may arguably be tied to the close state-controlled market at those times. In fact, before the foreign cigarette brands were allowed to enter the Turkish market, only Tekel cigarettes were smoked in Turkey. At that time, there were no tobacco advertising because Tekel was not required to advertise or promote its products[372].

This situation changed with the gradual liberalization of the Turkish market starting from mid-1980's, the multinational companies that entered the market started engaging in aggressive advertising, marketing and promotional activities. As a study carried out by Gilmore et. al. demonstrates, factors such as lower prices, widening and strengthening of distribution networks and aggressive lobbying of the tobacco companies against control measures increased smoking prevalence in the countries where the tobacco market was privatized[373]. Indeed, it can be seen that the increase in the smoking prevalence in Turkey went hand in hand with the increasing power of multinational companies in the Turkish market[374]. According to the official numbers, cigarette sales per

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[371] Yürekli et al., Türkiye'de Tütün Ekonomisi ve Tütün Ürünlerinin Vergilendirilmesi, Paris 2010, p. 21.

[372] Bilir et. al., p. 43.

[373] See Gilmore A.B./Fooks G./McKee M.: A Review of the Impacts of Tobacco Industry Privatisation: Implications for Policy, Global Public Health 6 (6), 2011, pp. 621–642.

[374] Elbek O. et. al.: Türkiye'de Tütün Kontrolü, Türk Toraks Derneği - Tütün Kontrolü Çalışma Grubu,

capita increased significantly between 1960 and 2000[375].

The increasing toll caused by the tobacco epidemic has led to an awareness about tobacco control in Turkey in the face of rising numbers of smokers among the population. In addition to the tobacco companies' marketing activities that clearly generated a positive impact on the smoking prevalence, lack of restrictions on smoking in public places was a big issue that needed to be dealt with. The effects of tobacco use on the Turkish people and the emergence of global anti-tobacco movement sparked the first initiatives to tackle these issues in the Turkey by the mid-1980's[376].

Concurrent with these developments, legislative efforts to implement certain tobacco control measures began. After 1986, several legislative proposals for tobacco control measures were submitted to the Grand National Assembly in an effort to protect the public health from tobacco use[377]. The bill which was submitted by Bülent Akarcalı on 29 May 1989 was approved by the parliament in 1991. Nevertheless, the bill faced a presidential veto on the ground that proposed bans violated free trade[378]. Another bill was submitted to the Grand National Assembly in 1992. However, this time the Commission of Justice ruled that there was not enough evidence on the health effects of tobacco use.

Ankara 2013, p.4.

[375] Bilir/Özcebe/Ergüder/Mauer-Stender, p. 10.

[376] For the emergence of nongovernmental anti-tobacco movements in Turkey, see Bilir/Özcebe/Ergüder/Mauer-Stender, p. 21.

[377] The first proposal was given by the Republican People's Party member Reşit Ülker on 7 March 1986. The Parliement was not able to finalize the bill within the related legislative year, so the bill became obsolete. In 1989, Social Democrat People's Party deputy Cüneyt Canver proposed a bill introducing smoking bans in the Law on Tobacco and Tobacco Monopoly no. 1177.

[378] Elbek et. al., p. 6.

So the bill was relayed to a sub-commission and was suspended for three years[379]. It was not until 1996 that Turkey finally managed to enact a law that regulated tobacco control.

1. Law No. 4207 on Prevention of Harms of Tobacco Products

"The Law No. 4207 on Prevention of Harms of Tobacco Products" was finally signed by the President and entered into force on 26 November 1996. Its main objective was to:

> *"take measures and make the necessary arrangements in order to protect people from harms of tobacco and tobacco products, and from any advertising, promotion or sponsorship campaigns promoting the use of them[380]."*

This law was a major turning point in the tobacco control history of Turkey and an important accomplishment for public health due to many reasons. First of all, it banned all kinds of advertising of tobacco products by using any names, trademarks or signs related to them, making direct advertisement of tobacco brands disappear. A stronger legal warning stating "*Legal warning: Hazardous to health*" were required to be printed on cigarette packs. Furthermore, sales to minors aged under 18 years were prohibited.

One of the most significant measures introduced by the Law No. 4207 was smoking bans in certain enclosed places, such as all health and educational facilities, as well as all kinds of vehicles that are used for public transport. Smoking was further restricted in all public buildings under certain conditions.

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[379] Bilir et. al., p. 63.

[380] Law No. 4207 on Prevention of Harms of Tobacco Products, Official Gazette No. 22829, 26 November 1996, Art. 1.

Implementation of punitive fines for the violations of bans under this law was not completely administered successfully, mainly due to lack of an authority charged with enforcing and collecting the punitive fines[381]. Nevertheless, particularly the bans made public transportation and aircrafts smoke-free and the law made a significant impact overall on public perception on tobacco control[382]. On the other hand, the bans on advertising and all promotional activities were administered successfully even though they were challenged by the tobacco companies on the grounds that they were unconstitutional[383].

2. Ratification of the FCTC and Preparation of National Tobacco Control Programme and Action Plan

Another important milestone in tobacco control was the ratification of the FCTC by Turkey. The Convention was signed by the Minister of Health on 28 April 2004 and ratified by the Grand National Assembly on 30 November 2004. As per Art. 90 of the Turkish Constitution, it carries the force of law since the day it was duly ratified and put into effect.

The ratification of the FCTC accelerated Turkish Government's efforts against tobacco. In line with its obligations under Art. 8 and the Guidelines of the FCTC, as well as the MPOWER policies, a "National Tobacco Control Programme" and an "Action

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[381] Yürekli et. al., p. 21.

[382] Elbek et. al., p. 6.

[383] Decision of the Constitutional Court, No. 1998/24 E., 1999/9 K., 13 April 1999. For a summary of the related decision, see below § Ch. 3 (IV)(C)(2)(a).

Plan" for the years 2008-2012 were drawn up jointly with the related ministries, public and nongovernmental institutions[384]. Meanwhile, the Ministry of Health established a National Tobacco Control Committee that assembled regularly to review the implementation of the programme.

3. TAPDK Regulation on Production Methods, Labelling and Inspection of Tobacco Products

As mentioned earlier, TAPDK was established within the modification of the tobacco legislation in 2002. It was authorized to regulate, inspect and control the tobacco market. In accordance with the Law no. 42017 and Law No. 4733, TAPDK published a regulation that governed the maximum amounts of ingredients in tobacco products and principles concerning their measurements, along with health warnings and other information mandated on the packaging of tobacco products[385]. With this Regulation, it was aimed to harmonize the Turkish legislation with the legislation of the EU[386].

By virtue of this Regulation, the mandatory legal warning "*Legal warning:*

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[384] Prime Minister's Circular No. 2006/29, Official Gazette no. 26312, 16 May 2008. MPOWER is a policy package prepared by the WHO for the purpose of assisting in the country-level implementation of tobacco control measures enshrined in the FCTC. Policies are comprised of: Monitor tobacco use and prevention policies; Protect people from tobacco smoke; Offer help to quit tobacco use; Warn about the dangers of tobacco; Enforce bans on tobacco advertising, promotion and sponsorship; Raise taxes on tobacco.

[385] Regulation on the Procedures and Principles Related to the Production Methods, Their Labelling and Inspection to Prevent the Harm Caused by Tobacco Products, Official Gazette No. 25692, 6 January 2005.

[386] See The European Commission's Directive No. 2001/37/EC on the Reconciliation between Acts, Regulations and Administrative Provisions on the Production of Tobacco Products, Marketing and Sales

Hazardous to health" was strengthened and replaced with two rotational warnings that state: "*Smoking kills/Smoking can kill*" or "*Smoking seriously harms you and others around you*" were printed on one side of cigarette packs. In addition, 14 different texts that were rotated on the other side of the packet including specific harmful effects of smoking and informational texts for quitting were mandated[387]. The mentioned warnings were to cover 30-40% of the wider sides of the pack.

Notably, the Regulation contained a provision that aimed to prevent tobacco companies from using descriptors that may be misleading with regards to the health effects of tobacco products. Said provision prohibited the use of "*any text, name, brand, variety name, simile, figure mark or other similar constructs that may imply that a tobacco product is less harmful than others*.[388]" A transition period was granted to tobacco companies to comply with the prohibition until 1 January 2006.

a. Amendment of 27 February 2010

TAPDK has made several modifications in this Regulation". Firstly, with an amendment published in February 2010, pictorial health warnings on tobacco packaging were introduced in Turkey[389]. According to the amended Regulation, combined health

[387] Regulation on the Procedures and Principles Related to the Production Methods, Their Labelling and Inspection to Prevent the Harm Caused by Tobacco Products, Appended Health Warning List.

[388] Regulation on the Procedures and Principles Related to the Production Methods, Their Labelling and Inspection to Prevent the Harm Caused by Tobacco Products, Art. 9.

[389] Regulation Amending the Regulation on the Procedures and Principles Related to the Production Methods, Their Labelling and Inspection to Prevent the Harm Caused by Tobacco Products, Official Gazette No. 27506, 27 February 2010.

warnings including 14 variations of graphic images were to be rotated on tobacco packs. Moreover, the combined warnings were to cover 65% of the wider side on the front of the pack, while 30% of the other wider side was covered with general health warnings[390].

b. Amendment of 22 November 2012

More than five years following the ban on misleading descriptors entered into force, TAPDK extended the mentioned ban by modifying Art. 9. The extended provision reads as follows:

> *"Misleading or inadequate information regarding product quality, health effects, dangers, and emissions may not be given on the visible outer packaging of unit tobacco product packages both manufactured in Turkey and imported, as well as their opening strips, aluminum folios, and on the cigarettes. Texts, names, brands, features, metaphors, pictures, figures, marking, or colours that suggest one tobacco product to be less harmful than others, encourage consumption, mislead consumers, or make the product attractive may not be used[391]."*

[390] For the pictures that were used after the said Regulation went into force on 1 May 2010, see Kuş S., Tütün Mamulleri Paketlerindeki Resimli Uyarıların Ülkemiz ve Dünya Uygulamaları, 2010, available at <http://www.ssuk.org.tr/content.php?haber_id=610> (last accessed: 30.12.2019), p. 3.

[391] Regulation Amending the Regulation on the Procedures and Principles Related to the Production Methods, Their Labelling and Inspection to Prevent the Harm Caused by Tobacco Products, Official Gazette No. 28475, 22 November 2012, at art. 2.

4. Law No. 5727 Amending the Law on Prevention of Harms of Tobacco Products

Around 10 years after the first tobacco control law that banned smoking in public places, a bill that incorporated more extensive bans by way of amending the previous law was drafted in 2006. The amending bill was published and entered into force in January 2008[392]. It amended the name of Law No. 4207 to "Law on Prevention and Control of Harms of Tobacco Products" and modified some of its provisions to extend the bans and make them more efficient and compatible with Turkey's obligations under the FCTC. The main purpose stated in the previous law was also modified to include the objective of "*ensuring that everybody enjoys clean air*[393]".

Implementation of the first part of the bans introduced in the Law No. 5727 which prohibited smoking in indoor areas of all public workplaces, all mass transportation vehicles including taxis, and privately owned buildings except for private households started 4 months after the Law's effective date[394]. The second part of the bans which

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[392] Law No. 5727 Amending the Law on Prevention of Harms of Tobacco Products, Official Gazette No. 26761, 19 January 2008.

[393] Law No. 5727, art. 2 modified Art. 1 of the Law No. 4207 which stipulates the objective of the law in the following paragraph:

"The objective of this Law is to take measures and make the necessary arrangements to protect individuals and future generations from the hazards of tobacco products and from any advertising, promotion or sponsorship promoting the use of tobacco products and ensure that everybody enjoys clean air."

[394] In 2013, the driver's seat of private cars was included in the areas where smoking is prohibited as well; see Law Amending Certain Laws and Governmental Decree No. 375, Official Gazette No. 28674, 11 June 2013.

covered hospitality industry, such as restaurants, coffee shops, cafes, bars or pubs were planned to implement 18 months later. The reason for this long transition period was to give the industry time to adapt to the prohibition. In fact, the mentioned ban has caused more controversy than any other measure implemented in Turkey. This stemmed mainly from the rooted tradition in Turkey of socializing in the local coffee shops encumbered with men most of whom are smokers. Apart from the smokers, business owners opposed this ban with the fear of losing customers. The representatives of such business owners and stakeholders in the hospitality and entertainment establishments resisted the ban and asked for separate smoking sections in such places to be allowed. Finally, they applied the Constitutional Court for the cancellation of the related ban. Nevertheless, their claims were dismissed by the Court[395]. Ultimately, with the Law No. 5727, Turkey has become one the first countries that fully implemented a smoking ban in enclosed places except for private households.

The amending law also introduced provisions that extend bans of advertising, sponsorship and promotion and incorporated more detailed provisions concerning the penalties in cases of violation and the authorities charged with implementing them. Notably, in accordance with Art. 13 of the FCTC and its guidelines, prohibitions were extended in a way to prevent tobacco companies from indirectly promoting or advertising their products. For example, brands, names, logos or trademarks of tobacco companies were prohibited from being used in any event or activity, nor they could be used on clothing or accessories[396]. Likewise, company vehicles were prohibited to bear any sign

[395] Decision of the Constitutional Court, No. 2010/58 E., 2011/8 K., Official Gazette No. 27858, 26 February 2011. The court decision will be discussed below. See below § Ch. 3 (V)(C)(1)(c)(cc).

[396] Law No. 5727, art. 4.

that would remind people of a tobacco brand. Handing out promotional tobacco products free of charge was also strictly prohibited.

5. TAPDK Regulation on Production and Trading of Tobacco Products

Another noteworthy regulation was issued by TAPDK in 2010, which concerns the procedures and principles related to manufacturing and trading of tobacco products[397]. According to this regulation, supplying products in the Turkish tobacco market is dependent on obtainment of a "certificate of conformity" from TAPDK. Tobacco companies are required to submit various documents to demonstrate that their products, including their packaging and its features comply with the laws and related regulations. Hence, the tobacco companies are also required to demonstrate that they comply with the rules under the above-mentioned Regulation on Production Methods, Labelling and Inspection of Tobacco Products which prescribe certain principles on packaging of tobacco products, including bans on misleading descriptors. Since this regulation prescribes a mechanism that allows TAPDK to inspect each tobacco product before they were supplied in the market, it was set forth by the complainants in the WTO dispute against Australia as an exemplary pre-vetting scheme that could be a rational and less trade-restrictive alternative to plain packaging[398].

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[397] Regulation on Procedures and Principles Related to Production and Trading of Tobacco Products, Official Gazette No. 27749, 4 November 2010.

[398] Panel Report, paras. 7.1707-1708.

6. Prohibition on Brand Stretching and Brand Sharing

In 2012, a paragraph was incorporated into Art. 3 of the Law No. 4207 in a way that extended the prohibitions on indirect advertising and promotion of tobacco products[399]. With this provision, Turkey banned what were respectively described in the guidelines related to Art. 13 of the FCTC as *"brand stretching"* and *"brand sharing"*[400]. Given that tobacco companies used these strategies to bypass the advertising and promotion bans, it was recommended in the guidelines to prohibit them, "as they are means of tobacco advertising and promotion[401]." The related paragraph reads as follows:

> *"The names, trademarks, emblems, logos of tobacco products, producers, importers and distributers or any other name and sign that is directly associated with them shall not be connected with any company in a non-tobacco good or service sector or with a non-tobacco product and shall not be used in a way that gives the impression that they are connected. In addition, the names, trademarks, emblems, logos of the companies distinct from tobacco products sector and of their goods and services, or any other name and sign that is directly associated with them shall not be connected with tobacco products or tobacco companies, and shall not be used in a way that gives the impression that the good or service*

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[399] Law No. 6354 Amending the Legislative Decree on Organization and Duties of Ministry of Health and its Subsidiaries and Certain Laws, Official Gazette No. 28351, 12 July 2012, art. 9.

[400] For a review of Turkey's compliance with Art. 13 of the FCTC before Law No. 6354, see Dilek A./ Seydioğulları M.: Tütün Reklamları, Promosyonu ve Sponsorluğuna Yönelik Yasaklar: Neredeyiz? Nasıl ilerleriz?, Sürekli Tıp Eğitimi Dergisi 21 (6), 2012, pp. 326-332.

[401] See above § Ch. 1 (III)(B)(5).

is connected with tobacco products, there may be no sign or colour that can be associated with tobacco products on any product."

As per the law, TAPDK was authorized to regulate the principles and procedures concerning the enforcement of the ban on brand stretching and brand sharing, following the consideration of the Ministry of Health. Accordingly, TAPDK issued a decision on 20 November 2012[402]. The decision contains provisions that prescribes the above-mentioned bans introduced by law and principles and procedures concerning how TAPDK would assess compliance with them. In that respect, TAPDK would review whether there was a likelihood of association in a way that constituted brand stretching or sharing in light of criteria stipulated in the Decision. The first criteria to be considered by TAPDK required a similarity test between the compared elements that might create likelihood of association. The second criteria required an assessment of whether advertisement or promotion of a tobacco product or a tobacco brand was aimed with the use of subject element.

Decision No. 7055 further requires all manufacturers, importers and distributors acting in the tobacco market to submit a letter of undertaking to TAPDK with regards to their products' compatibility with the related provisions of the Law and this Decision. In case of any violation against the ban on brand stretching and sharing, any perpetrator and their accomplices shall be fined with an administrative penalty.

In 2012, TAPKD issued a decision amending the afore-mentioned Decision No. 7055[403]. Amendments included forming of a commission under TAPDK consisting of

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[402] Decision of the Tobacco and Alcohol Market Regulatory Council No. 7055, Official Gazette No. 28473, 20 November 2012.

[403] Decision of the Tobacco and Alcohol Market Regulatory Council No. 10936, Official Gazette No.

experts in different areas authorized to review TAPDK's reports on violations of brand stretching or sharing. On the other hand, it introduced a more detailed provision on the criteria to be considered by TAPDK when assessing the likelihood of association as per the Law. It regulated a gradual test which involves respective evaluation of three criteria: whether the compared elements are of the same shape or design, or they are identical; whether there is a legal or economic connection between the compared elements; and finally whether the compared elements are similar or whether the subject element associate with a tobacco product or a tobacco company or promotes tobacco use.

7. Regulation on the Procedures and Principles Related to Sales and Presentations of Tobacco Products and Alcoholic Beverages

In 2011, TAPDK published a new regulation that governs the procedures and principles related to sales and presentations of tobacco products and alcoholic beverages[404]. In line with the substantive provisions of the FCTC, specific rules that prevented companies from engaging in any activities that advertise, promote or incentivize the use of their products were regulated, further to the provisions of the Law No. 4207. The way tobacco products are presented and sold at the retailers were also regulated in a way that rendered tobacco products less visible and reachable. Certain inspection and sanctioning mechanisms in cases of breaching the Regulation were prescribed by TAPDK.

29689, 19 April 2016.

[404] Regulation on the Procedures and Principles Related to Sales and Presentations of Tobacco Products and Alcoholic Beverages, Official Gazette No. 27808, 7 January 2011.

C. OVERVIEW OF TURKEY AT THE TIME WHEN PLAIN PACKAGING WAS INTRODUCED

As described above, Turkey has a long history with tobacco, of which the production and trade have been of significant importance politically and economically. Over the last 30 years, the state policies have led to a dramatic transformation in the Turkish tobacco market. The transnational tobacco companies were gradually allowed to penetrate the market via first trading, then distribution, and finally direct manufacturing as the state monopoly was removed and state subsidies granted to farmers were abolished. Local production decreased and imports increased, as the state withdrew its financial support from the farmers and introduced contract production model. Concurrently, transnational tobacco companies gained a decisive power in the production and trade of tobacco in Turkey. As a matter of fact, all of the above-mentioned changes that restructured the Turkish tobacco market seem to have made business of tobacco companies more and more profitable in Turkey[405].

In the meantime, rates of tobacco consumption have accelerated for the most time. Since the mid-1990's, Turkey implemented tobacco control laws to fight back against the negative consequences of tobacco use. Particularly after the ratification of the FCTC, Turkey's anti-tobacco legislations have been among the strongest worldwide. The history of Turkish tobacco control policies and the key legislations enacted were briefly explained above. In addition, the government has gradually increased excise tax on tobacco products and continued implementing the National Tobacco Control Programme

[405] For a detailed study on the transformation of the Turkish Market, see Gültekin-Karakaş D.: Market Oriented Transformation of Tobacco Sector in Turkey, Turkish Thoracic Journal 15 (2), 2014, pp. 71-91.

and action plans.

Even though Turkey has been recognized as one of the leading states with respect to regulating strong anti-tobacco laws, the above-mentioned tobacco control policies implemented by Turkey have not managed to consistently reduce the rate of smoking prevalence[406]. As demonstrated by the Tobacco Control Scale published in 2016, Turkey also experienced problems in the enforcement of such measures and regressed in the European ranking of Tobacco Control Scale after 2010[407]. As argued by many critics, one of the reasons for this was neglecting supply-side measures while focusing on adopting measures that aim to reduce demand[408]. Even though Art. 5.3 of the FCTC obliges Turkey to protect its tobacco control policies from the interference of the interests of the tobacco industry, it is shown that Turkey played a part in fueling the supply in the Turkish market by granting a great deal of incentives to the tobacco companies, let alone restricting the supply of tobacco products[409]. In fact, the "tobacco fund" tax which were collected from imported tobacco goods to subsidize local production has been gradually lowered and was finally abolished by 2019[410]. Another fact that clearly demonstrated this

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[406] See Mucan/Moodie, noting: *"In Turkey, a middle-income country, smoking prevalence is 27.3% (41.8% of men, 13.1% of women).2 Approximately 110000 people die of smoking-related diseases each year in Turkey, a figure expected to rise to 240000 per year by 2030. In contrast to many developed countries, smoking prevalence in Turkey has increased recently."*

[407] See Joossens L./Raw M.: The Tobacco Control Scale 2016 in Europe, Belgium 2017.

[408] Elbek et. al., p. 3; Gültekin-Karakaş, p. 85.

[409] See Evrengil E.: TKÇS Uygulamasında Politika Çatışması: Türkiye'de Tütün Endüstrisine Sağlanan Yatırım ve İhracat Teşvikleri (Policy Conflict in FCTC Implementation: Investment and Export Incentives Granted to Tobacco Industry in Turkey), Sürekli Tıp Eğitim Dergisi (26), 2017, pp. 18-29.

[410] According to the report prepared by the Chamber of Agricultural Engineers in 2018, the state's financial

policy conflict was that both authorities of regulating the tobacco market and the implementing tobacco control measures were vested in one public entity, TAPDK. To that end, in spite of enacting anti-tobacco laws pursuant to its undertakings as per the FCTC, Turkey has yet to embrace a fully comprehensive tobacco control policy, as the tobacco companies have not been subject to strong regulatory restraints in the manufacturing and trade of their products.

Nonetheless, it can be said that Turkey consistently adopted demand-reduction measures that have been approved by WHO; and plain packaging was the next logical progression in this policy direction following the developed countries that implemented the subject measure.

Meanwhile, TAPDK was closed pursuant to a governmental decree published in December 2017. Most of TAPDK's duties and authorities were assigned to the Ministry of Food, Agriculture and Livestock, while some of them related to tobacco control were assigned to the Ministry of Health. As part of a restructuring made in the ministries, the Ministry of Food, Agriculture and Livestock was transformed into the Ministry of Agriculture and Forestry. Under this new ministry, a Department of Tobacco and Alcohol was formed and it is currently assigned with regulating and inspecting the tobacco market as well as some duties regarding tobacco control.

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loss due to the policy of gradually lowering the tobacco fund tax has reached over 1 Billion USD by the end of 2017. See Ziraat Mühendisleri Odası, Tütün Raporu 2018 (Tobacco Report 2018), available at <http://www.zmo.org.tr/genel/bizden_detay.php?kod=30641&tipi=5&sube=0>. (last accessed: 30.12.2019)

III. THE PLAIN PACKAGING LEGISLATION

A. LEGISLATIVE ACTION: A DELAYED PROCESS

Gaining a significant acceleration in regulating strong tobacco control measures to reduce demand, Turkey was expected to be one of the first countries that implemented plain packaging[411]. In 2012, the WHO representative in Turkey stated WHO's hopes that Turkey would be the pioneering state in Europe to adopt plain packaging[412]. Against those expectations, the Turkish government took its time while several countries such as France, UK, Ireland and Norway developed plain packaging regulations. In January 2015, mandating plain packaging of tobacco products was included in the National Tobacco Control Program Plan of Action for the years 2015-2018. According to the mentioned plan, the goal to "make the necessary regulations changes concerning the standardized plain package application" was planned to be completed by the year 2015[413].

While Turkey made its intention very clear on adopting plain packaging in 2015, the process suddenly halted. On a public interview in April 2016, Turkey's Minister of Health announced that the Turkish government renounced plain packaging due to the

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[411] Harvey B.: Turkey Working on Cigarette Branding Ban Law, Milliyet Says, Bloomberg (online news article), available at: <https://www.bloomberg.com/news/articles/2011-09-07/turkey-working-on-cigarette-branding-ban-law-milliyet-says>. (last accessed: 30.12.2019)

[412] WHO, Award to WHO Representative in Turkey to Support Tobacco Control Activities of the Ministry of Health, January 23 2012, available at: < http://www.euro.who.int/en/countries/turkey/news/news/2012/01/award-to-who-representative-in-turkey-to-support-tobacco-control-activities-of-the-ministry-of-health>. (last accessed: 30.12.2019)

[413] Prime Minister's Circular No. 2015/1, Official Gazette No. 29249, 27 January 2015, at p. 27/9.

concerns that it violated international trade law and there were not enough statistical evidence on its efficiency[414]. Evidently, Turkey's hesitance was based on the regulatory chill effect caused by the transnational tobacco companies' efforts in dissuading governments by invoking international trade and investment agreements. After the WTO Panel issued its decision to uphold the Australian regulation in 2018, the Grand National Assembly approved a law that finally introduced plain packaging in Turkey on 15 November 2018.

As discussed below in more detail, the Turkish plain packaging scheme is constituted by the relevant provisions incorporated into Law No. 4207 and a Regulation later prepared by the Ministry of Agriculture and Forestry. Not differently from the Australian example discussed in the second chapter, Turkish plain packaging regulations eliminate the use of tobacco companies' trademarks, except for the use of simple word marks written in a uniform font, font size, and in a prescribed colour. It should be noted that, unlike Australia, Turkey has not incorporated any provisions in laws governing trademark protection concurrent with the adoption of plain packaging.

[414] Erşan M.: "Düz Paketten Neden Vazgeçtik?", Hürriyet, 30 May 2016, available at: <http://www.hurriyet.com.tr/kelebek/saglik/duz-paketten-neden-vazgectik-40111127> (last accessed: 30.12.2019); Star (online article), "Sağlık Bakanı Mehmet Müezzinoğlu: Kampüste sigara satışını kaldırıyoruz", 21 April 2016, available at: <https://www.star.com.tr/saglik/kampuste-sigara-satisini-kaldiriyoruz-haber-1105472/> (last accessed: 30.12.2019).

B. LAW NO. 7151: INCORPORATION OF PLAIN PACKAGING INTO LAW NO. 4207

Law No. 7151 which included some amendments made in the Law No. 4207 was published on 5 December 2018 upon confirmation of the Presidency[415]. Other than plain packaging, the amendments on the Law No. 4207 enlarged the size of mandatory health warnings on each of the two largest surfaces of tobacco product packaging from 65% to 85%, extended the ban on the depiction of tobacco products and use in media to Internet and publicly accessible social media or similar channels with commercial purposes or with intent of advertising, and prohibited the sales on tobacco products in places where services of healthcare, education, cultural and sports are provided.

The following paragraph was incorporated into Art. 4(3) of the Law No. 4207:

> *"Tobacco products manufactured in Turkey or imported from overseas shall be released to the market with plain and standard packaging with the same design for writing of brands, font and font size, placement on the package, the colour of the package and other markings including other writings, expressions and shapes. The brand name shall be placed only on one side of the package and shall not exceed five percent of the surface. The packages shall not contain any logos, symbols or other similar markings of the brand. These rules also apply to tobacco product boxes that contain more than one package."*

The above-mentioned amendments entered into effect on the day that the law was published. However, by virtue of the Temporary Article 5, a transition period of 7 months

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[415] Law No. 7151 Amending Certain Laws and Legislative Decrees Regarding Healthcare, Official Gazette No. 30616, 5 December 2018, at articles 23-25.

was granted for the manufacturers to comply with the new requirements concerning plain packaging. Ministry of Agriculture and Forestry was authorized to further extend this period up to 6 months. In addition, Ministry of Agriculture and Forestry was assigned with preparing a regulation that shall prescribe the details concerning the new packaging requirements in the following paragraph that was incorporated into Art. 4(5) of the Law No. 4207:

> *"The matters regarding the warnings, images, shapes or graphic messages indicated in this Law, the writing, font and font size of the brand name on the package, its placement on the package, the colour of the package, the warning messages placed on the package and single-type plain and standard package design including other mandatory writings, expressions and shapes are regulated by directive prepared by the Ministry of Agriculture and Forestry, with approval of the Ministry of Health."*

After all, plain packaging was introduced in the Turkish legislation through a total of five paragraphs enshrined in an omnibus bill. These paragraphs were ultimately incorporated into Law No. 4207, i.e. Turkey's tobacco control law. Notably, legislators have not stipulated any reasoning that laid down plain packaging's objectives when adopting the law. The generable preamble of the omnibus bill does not even mention the amendments made to Law No. 4207 at all, while the specific articles that supposedly explain the *ratio legis* of each clause drafted in the bill only explain what is regulated, but not the underlying objectives of the relevant provisions. That being said, the objective of the provisions that mandate plain packaging in the Turkish law can only derive from Art. 1 of the Law No. 4207 that was modified in 2008[416]. This can be considered as a

[416] See above, fn. 387.

problematic issue given that the stated objective of the Law only draws a general purpose for tobacco control measures; and do not provide any reasoning for the adoption of individual measures related to packaging, or the specific aims sought by standardizing tobacco packaging.

C. REGULATION OF THE MINISTRY

Based on the regulatory power delegated by the law, the Ministry of Agriculture and Forestry issued "The Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products"[417]. This regulation abrogated the previous regulation issued by TAPDK that covered the same issues, and brought the legislation up to date according to the latest modifications in Law No. 4207. It sets out certain rules on how plain packaging shall be implemented, by way of incorporating matters such as the way the brand name shall be written on the package, its font and size, as well as its positioning on the package. Together with the specifications on the packaging colour and how the warning messages and other mandatory texts and information, the Regulation prescribes the implementation of plain packaging of tobacco products in Turkey.

[417] The Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Official Gazette No. 30701, 1 March 2019.

1. The Use of Brand and Variant Names on Tobacco Products and Packaging

According to Art. 10 of the Regulation, the brand name is placed only on the front side of the package, with the first letter of the word upper case and the others lower case, in Helvetica font and in Cool Gray 2 C Mat finishing colour. No character other than letters, numbers and "&" is allowed to be used in a brand name. Furthermore, a "distinguishing mark" was allowed to be placed on the back side of the bag packages, and on the bottom surface of all other packages[418]. So on a regular cigarette pack, the brand name was to be placed on the front side, and the variant name on the bottom surface. This arrangement was modified before the implementation of plain packaging on June 2019, when the Ministry of Agriculture and Ministry issued an amendment on the Regulation[419]. According to the amendment, the variant name shall be placed under the brand name on the front side of the packaging, 2 font sizes smaller than the brand name[420].

Other than the packaging, the Regulation prescribed that brand names shall be written in a uniform single-type on the tobacco products as well. The brand names on the cigarette sticks shall be written similar to the brand name on packaging, only in size 8 at the most and in colour black[421]. On other tobacco products brand names shall be placed

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[418] The word "Distinguishing mark" in this regulation is meant to refer brand variants such as "gold", "blue" or "slims".

[419] The Regulation Amending the Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Official Gazette No. 30814, 27 June 2019.

[420] Ibid, at. Art. 1.

[421] The Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Official Gazette No. 30701, 1 March 2019 (amended on 27 June 2019), at art. 10 (4-5).

on the internal wrapping of the products if any, and on the rings of cigars and cigarillos[422]. Apart from the packaging and the products, the brand name and variant name are placed on the boxes that contain cartons of tobacco products in a uniform manner, as well as the labels on the boxes and transparent labels on cartons[423]. It is explicitly provided that brand name and variant name shall not be written anywhere else other than what is specified in Art. 10. Art. 11 (8) further provides that brand or variant name cannot be used anywhere other than what is prescribed by the Regulation, such as box tape, opening strip and aluminum foil of tobacco products.

Furthermore, under Art. 10 (11), it is provided that a brand or variant name cannot include features that:

> *"a) Give a false impression about a tobacco products properties, health effects, risks or emissions to promote the tobacco product and encourage consumption, give incomplete information, mislead or deceive the consumer,*
>
> *b) Make tobacco products tempting or attractive,*
>
> *c) Include or refer to information about nicotine, tar or carbon monoxide emissions,*
>
> *ç) Claim or imply that one tobacco product is less harmful than another, that it aims to reduce the harmful components of smoke, gives energy has curative, rejuvenating, natural or organic properties, has other positive health or lifestyle benefits,*
>
> *d) Refer to taste, scent, any flavor additive or other additive substances or absence thereof,*

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[422] Ibid, art. 10 (6).

[423] Ibid, art. 10 (8-9).

e) Refer to a food or cosmetic product,

f) Claim that a certain tobacco product has advanced biodegradability or other environmental advantages,

g) Provide economic advantages such as discounts, free distribution, two for one price or other offers including coupons."

This provision is much more extensive than the provision in the TAPDK's afore-mentioned regulation that prohibited the use of misleading information on the identification of tobacco products, in a sense that it covers a wide range of possibilities in which brand or variant names can be used as a means of advertising, promotion or misleading the consumers about the products. With this extended ban, it was arguably aimed to hinder tobacco companies from innovating their product names and descriptors in order to make up for the lost venue for marketing through packaging. Tobacco companies are indeed known for using creative ways to alter the names of their products to sidestep tobacco control measures that restrict their freedom[424]. In fact, it was reported that Turkish authorities considered banning use of variant names altogether and replacing them with numbers before plain packaging was adopted[425]. Another option would be to impose a single-presentation measure for each tobacco brand as Uruguay did. Nonetheless, Turkey chose to extend the pre-existing restrictions on the use of such names as described above.

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[424] Doward J.: The Guardian, How Tobacco Firms Flout UK Law on Plain Packaging, available at <https://www.theguardian.com/society/2017/apr/09/tobacco-companies-flout-law-plain-packaging>. (last accessed: 30.12.2019)

[425] Hurriyet (online news article). Sigara Yasağında Yeni Dönem, 2014, available at <www.hurriyet.com.tr/sigara-yasagindayeni-donem-26785386>. (last accessed: 30.12.2019)

2. Other Specifications Concerning Packaging and Properties of Tobacco Products

The Regulation specifies that the colour and tone of the outer surfaces of the packages must be in Pantone 448 C Mat finishing, which is known as "drab brown"[426]. In light of the studies carried out in Australia before plain packaging, this colour was reported to be associated with the words "dirty", "tar" and "death" and was found overwhelming and unappealing[427]. For this reason, the colour seems to have become a standard in plain packaging applications as other countries, including Turkey, that implemented plain packaging followed Australia in using this colour[428].

Pursuant to the first version of the Regulation, the inner surface colour of packages was allowed to be drab brown or white, while the box had to be craft brown. With the amendment published in June 2019, the inner surface colour of packages were allowed to

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[426] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (1).

[427] For the market research reports commissioned by the Australian Government on tobacco packaging, see: Australian Government Department of Health, Market Research Reports on tobacco plain packaging and graphic health warnings, available at <https://www1.health.gov.au/internet/main/publishing.nsf/Content/mr-plainpack> (last accessed: 30.12.2019). Also see Mckenzie S.: Will sludge-color packaging deter smokers?, CNN, available at <https://edition.cnn.com/2016/06/09/health/pantone-448c-color-cigarette-advertising/index.html> (last accessed: 30.12.2019).

[428] See Moodie C. et. al.: Plain packaging: legislative differences in Australia, France, the UK, New Zealand and Norway, and options for strengthening regulations, Tobacco Control (28), 2019, pp. 485-492.

be craft brown, in addition to drab brown and white[429]. On the other hand, the inner frames of cigarette packages and inner panels of cigar and cigarillo packages were required to be drab brown[430].

The shape and structure of the packages were also prescribed by the Regulation. The packages of cigarette, cigar and cigarillo are required to be rectangular prism or similar shape, while packages of hookah, pipe and rolling tobacco can also in cylinder or bag form[431]. The cigarette packages are required to be "made of cardboard or soft material and shall have a hard cover top that cannot be closed or resealed after initial opening of package[432]". The hard packages are required to have flip-tops that can only be attached from the back side of the package. Notably, sizes of the packs and cigarettes were not standardized by the Regulation. The fact that these aspects were not standardized even though the Law mandated "*plain and standard*" packaging has been criticized by some tobacco control experts in Turkey[433].

The colour of the materials used in inside packages were also regulated.

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[429] The Regulation Amending the Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, art. 2.

[430] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (2).

[431] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (4).

[432] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (5).

[433] Uzmanlar 'sigarada düz paket' uygulamasını değerlendirdi: İşe yarayacak mı?, Sözcü (online news article), 8 December 2019, available at <https://www.sozcu.com.tr/2019/saglik/uzmanlar-sigarada-duz-paket-uygulamasini-degerlendirdi-ise-yarayacak-mi-5496772/> (last accessed: 30.12.2019).

Aluminum foil or metallic paper used in the packaging are required to be in silver colour, whereas the paper part of the aluminum foil is required to be white[434]. It is prohibited to use any picture, pattern or symbol on the textured aluminum foils. Furthermore, the inner wrappings for tobacco products were required to be drab brown. With the amendment published in June 2019, such wrappings can be in silver colour as well[435]. On the other hand, inner wrappings of aroma free hookah tobacco products are required to be made from paper material of either white or craft brown, while aromatic hookah products, cigars and cigarillos can be wrapped in transparent material[436].

Aside from the uniform use of brand name on the cigarettes, the colour of the cigarette papers and the tip of the cigarettes are specified in the Regulation. As per Art. 11 (9), all cigarette papers are required to be white with a mat finish, and the tip papers must be plain white and/or with imitation cork pattern. Number of cigarettes contained in one pack is fixed by the Regulation to twenty[437].

There are several provisions in the Regulation that clearly aim to prevent manufacturers from using create ways to differentiate their products and communicate messages to the consumers via packaging. It is stated that a cigarette package "cannot have features to change the size of any visible space, expand a surface or create new

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[434] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (6).

[435] The Regulation Amending the Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, art. 2.

[436] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (12).

[437] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 11 (10).

surfaces using the inner panel[438]". Use of "material that makes sound or emits a scent" as well as "ink that is heat activated, appears over time or has a florescent appearance" are also expressly prohibited[439]. Moreover, the Regulation prohibits use of external sheaths or stickers on the packaging[440]. It can be argued that tobacco industry tactics used in other countries that implemented plain packaging were considered by the Turkish authorities when preparing such provisions[441]. There are studies showing that plain packages can become more attractive when certain designs are applied on them[442]. By regulating the above-mentioned extensive restrictions, Turkey seems to made an effort to leave no loopholes for the tobacco companies to innovate the packaging of their products by means of bypassing plain packaging rules.

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[438] Ibid., Art. 11 (7).

[439] Ibid., Art. 11 (13, 14).

[440] Ibid., Art. 11 (15).

[441] In fact, it was reported that tobacco companies reacted to plain packaging rules in countries such as Australia and the UK by investing on pack innovation. See Moodie C.: Commentary on Greenland: Tobacco Companies' Response to Plain Packaging in Australia and Implications for Tobacco Control, Addiction 111 (12), 2016, pp. 2259-2260.

[442] See e.g. Kotnowski K./Hammond D.: The impact of cigarette pack shape, size and opening: evidence from tobacco company documents, Addiction 108 (9), 2013, pp. 1658-68; Borland R./Savvas S./Sharkie F, et al.: The impact of structural packaging design on young adult smokers' perceptions of tobacco products, Tobacco Control (22), 2013, pp. 97-102; Mucan B./Moodie C.: Young adult smokers' perceptions of plain packs, numbered packs and pack inserts in Turkey: a focus group study, Tobacco Control, 27 (6), 2018, pp. 631-636; Evans-Reeves K.A./Hiscock R./Lauber K, et al.: Prospective longitudinal study of tobacco company adaptation to standardized packaging in the UK: identifying circumventions and closing loopholes, BMJ Open 2019 (9).

3. Health Warnings

As per the Regulation, combined warnings span 85% of both of the widest surfaces of the packages[443]. They are comprised of an image, a warning text and quitting information. The content of combined health warning are determined by the Ministry of Agriculture and Forestry in collaboration with Ministry of Health[444]. During the transition period, 14 different combined health warnings were published on the Ministry's website that will be rotated on the packages[445]. One of the combined health warnings is required to be placed in a way that starts from the top edge of the side that it is on[446]. The same warning will be placed on both sides[447].

Furthermore, a general warning and an information message must be placed on the long sides of the packages[448]. Regulation provides that the mentioned warning and information message are determined by the Ministry of Agriculture and Forestry[449]. Accordingly, the Ministry has published on its website that general warning states:

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[443] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 14.

[444] Ibid., Art. 14 (1)(a).

[445] For the health warnings published on the Ministry's website, see Ministry of Agriculture and Forestry's website available at <https://www.tarimorman.gov.tr/TADB/Menu/22/Tutun-Ve-Tutun-Mamulleri-Daire-Baskanligi> (last accessed: 30.12.2019).

[446] Regulation on the Procedures and Principles Related to the Production Methods, Labeling and Surveillance of Tobacco Products, Art. 14 (1)(d).

[447] Ibid., Art. 14 (1)(ç).

[448] Ibid., Art. 13 (4).

[449] Ibid., Art. 13 (2).

"cigarettes (tobacco) kills – quit now", and information message states: "tobacco smoke contains more than 70 substances known to cause cancer"[450].

4. Transition Period

The first version of the Regulation as published in March 2019 granted a transition period for the manufacturers to comply with new packaging rules until 5 July 2019. With the amendment published in June 2019, this period was extended until 5 December 2019. In this transition period, the manufacturers were allowed to produce fully branded packaging pursuant to the previous rules. The sale of such products with branded packaging were permitted until 5 January 2020. All products sold at the retail level had to accord with the Regulation after that date.

[450] For templates of warning messages published by the Ministry, see Ministry of Agriculture and Forestry, Warning Messages Template, available at <https://www.tarimorman.gov.tr/TADB/Belgeler/T%C3%BCt%C3%BCn%20Mamulleri/A.7.%20Birlesik_uyarilara_iliskin_bilgiler/genel%20uyar%C4%B1%20ve%20bilgi%20mesaj%C4%B1.pdf> (last accessed: 30.12.2019).

IV. ANALYSIS OF THE COMPATIBILITY OF PLAIN PACKAGING RULES WITH TURKISH LAW

A. IN GENERAL

In the second chapter, we have discussed the legal challenges mounted against Australian legislation that introduced the first plain packaging laws of the world. Although there has been no adverse judgement against plain packaging regulations so far, it cannot be expected with certainty that the tobacco industry would not challenge the legitimacy of similar laws of other countries. For years, the legal battles fought by the tobacco industry have been effective in creating a *chilling effect* for many countries. The main objective underlying the industry's challenges mounted against Australia was arguably to set a precedent and create a global effect in that sense. In fact, Australia was not among the most valuable markets for multi-national tobacco companies, considering the small population and relatively low smoking rates[451]. It is thus plausible that tobacco companies would pay close attention to each domestic legislation, and try to overturn any plain packaging laws they consider "weak" regardless of the losses they suffered in the above-mentioned cases. For this reason, it is important to scrutinize the compatibility of Turkish legislation that mandate plain packaging.

In all of the above-mentioned cases, we have highlighted that the main legal issues discussed were centered at trademark rights protected under the constitution of Australia,

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[451] Voon T.: Big Tobacco vs. Australia's Plain Packaging, Pursuit, 2018, available at <https://pursuit.unimelb.edu.au/articles/big-tobacco-vs-australia-s-plain-packaging> last accessed: 30.12.2019).

as well as international agreements. Against this fact, and in line with the scope of this thesis, we will first scrutinize the Turkish legislation in relation to plain packaging and how it interacts with trademark law below. We will try to highlight the aspects that tobacco companies could base their legal arguments on. In that vein, we will first consider the plain packaging measures' effect on tobacco companies from the perspective of trademark law; and then consider its interference with constitutional rights and freedoms. In line with these considerations and implications derived from the above-mentioned legal challenges, we will finally consider possible tobacco industry claims based on international investment and trade agreements that Turkey has signed.

B. PLAIN PACKAGING CONSIDERATIONS UNDER TURKISH TRADEMARK LAW

1. General Relationship Between Plain Packaging Scheme and Trademark Legislation

Restriction on the use of trademarks has been at the center of the legal issues concerning plain packaging rules' compatibility with laws and international agreements. Indeed, as we discussed in the second chapter, the most plausible claims of the opposing parties were based on the elimination of tobacco industry's ability to use their trademarks, due to the strict nature of restrictions imposed by plain packaging policies. Hence, in the previous examples that came before Turkey, we can see legislations that include special provisions to ensure that plain packaging measures do not interfere with domestic and international laws governing trademark protection. It is particularly important that such measures do not create obstacles against trademark registration; and do not deprive the

owner of a trademark of the legitimate rights stemming from trademark registration. By incorporating a provision that annihilates these risks, it is aimed to prevent tobacco companies from mounting successful legal challenges based on trademark rights.

In the Australian example, we mentioned that the relevant law related to plain packaging also incorporated several provisions into the law governing trademarks in order to ensure that the implementation of the measure did not amount to loss of any rights on trademarks registered in Australia[452]. It was explicitly provided that tobacco companies maintained their rights pertaining to registered trademarks; and that their non-use due to the plain packaging scheme did not serve as grounds to refuse a trademark registration or to revoke the registration of a trademark. Trademark registration saving provisions can also be seen in the legislation of other countries such as UK and Ireland as well[453]. Whereas Ireland chose to include a simpler provision providing that the measure at issue do not prohibit the registration of any trademark or it cannot be grounds for revocation of a trademark; the UK incorporated a very comprehensive provision similar to Australia. It can be seen that the legislators made the maximum effort in order to not leave any room for interpretation and avoid any doubts concerning the compatibility of plain packaging with trademark law.

Nevertheless, let alone a trademark-saving provision, the Law No. 7151 which incorporated the legal framework of plain packaging scheme in Turkey did not contain any provision that constituted an inter-relationship with trademark legislation, namely the

[452] See above § Ch. 2 (II)(A)(3).

[453] UK – The Standardised Packaging of Tobacco Products Regulations 2015, No. 829, Regulation 13; Ireland -Public Health (Standardised Packaging of Tobacco) Act 2015, Section 5

Law on Industrial Property that entered into effect in 2017[454]. In other words, it was not considered necessary by the law-makers in Turkey to regulate with regards to any consequences of preventing the use of tobacco-related trademarks. This could be explained with lack of aggressive tobacco industry lobbying on the government level in Turkey, as opposed to the previous examples. Yet, this exercise of the law-makers that disregarded such examples could be questioned, particularly considering the consequences of non-use of trademarks stipulated in LIP. Below, we will first discuss how the plain packaging scheme limits the use of trademarks protected in Turkey; then explore how use of trademark is regulated in the Turkish law and the legal consequences attached to non-use. We will then consider the effects of plain packaging restrictions in consideration of the same.

2. Plain Packaging Restrictions on the Use of Trademarks

a. Registered Trademarks in Turkey

Turkish legislation governing trademark protection is very much aligned with the EU legislation and international treaties that Turkey is signatory to[455]. The principles and procedures with regards to the protection of trademarks are governed by the Law on Industrial Property (LIP) that was enacted in 2017[456]. According to Art. 4 of the LIP,

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[454] Law on Industrial Property No. 6769, Official Gazette No. 29944, 10 January 2017, ("LIP").

[455] Namely, the Paris Convention and the TRIPS Agreement.

[456] Prior to the Law on Industrial Property, the intellectual property laws were covered in governmental decrees. For the main legislation that was in force before the LIP, see Governmental Decree No. 556,

"*Trademarks may consist of any signs like words, including personal names, figures, colours, letters, numbers, sounds and the shape of goods or their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and being represented on the register in a manner to determine the clear and precise subject matter of the protection afforded to its proprietor.*"

On the other hand, trademark protection is based on registration under the Turkish trademark law. In other words, a proprietor must have his trademark registered so as to gain the rights granted by trademark under the LIP. Accordingly, a number of trademarks that were used on tobacco products have been registered in Turkey since the 1980's, following the abolishment of monopoly in tobacco products. Such trademarks that were registered in Class 34 under Nice Classification include well known trademarks of multinational companies, such as Marlboro, Camel and Winston[457].

b. Use of Trademark under Turkish Law

Before going into the effects of plain packaging measures, we should first address how the Turkish law regulates use of trademark. Art. 9 of the LIP entitled "Use of

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Official Gazette No. 22326, 8 June 1995.

[457] The Nice Classification (NCL), established by the Nice Agreement (1957), is an international classification of goods and services applied for the registration of marks. Class 34 under the NCL concerns: tobacco and tobacco substitutes; cigarettes and cigars; electronic cigarettes and oral vaporizers for smokers; smokers' articles; matches. For the list of registered trademarks in Turkey, see Turkish Patent and Trademark Office's Trademark Database, available at: <https://online.turkpatent.gov.tr/trademark-search/pub/trademark_search?lang=en>

trademark" does not define what constitutes use. However, it determines a sanction of "revocation" in case trademark is not put to use according to certain principles[458]. These principles, which will be further described below, establish the framework of what can be considered use of trademark under Turkish Law.

First of all, it should be mentioned that use is not a pre-condition for registration as per the Turkish trademark law. There is no special use requirement imposed as a condition for the maintenance of trademark registration either. However, similar to national laws of many other countries, as well as international treaties, there are several legal consequences attached to non-use of a registered trademark[459]. In fact, non-use may have severe results such as depriving the owner of the exclusive rights conferred by trademark protection; and even ultimately losing the trademark. It should be noted, however, that these are not absolute results of non-use because they are contingent upon third party application. In other words, the trademark owner does not lose the trademark or the exclusive rights related to it automatically. In the absence of a third party application, trademark can be maintained as long as the registration is renewed in due time[460]. Moreover, there is a "*grace period*" of five years provided by the law during

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[458] Some of the said principles were contained in the promulgated Governmental Decree No. 556, while some of them were based on the case law and literature. These principles were incorporated in the law under Art. 9 of the LIP. See Karaca O.U.: Markayı Kullanma Zorunluluğu ve Kullanmamanın Hukuki Sonuçları, 2. Baskı, Ankara 2018, p. 33.

[459] For a comparative study on the requirement of use and legal consequences attached ton on-use with regards to Turkish legislation and some other national laws, see Dirikkan H., Tescill Markayı Kullanma Külfeti, Prof. Dr. Oğuz İmregün'e Armağan, İstanbul 1998.

[460] The term of protection for registered trademark is ten years as per the Turkish Law. The term can be renewed for periods of ten years. See Art. 23 of the LIP.

which non-use does not have any adverse effect on trademark rights.

The fact that use is not an absolute requirement for securing a trademark and maintaining trademark protection while a non-used trademark can be subject to certain sanctions, has led to differing arguments in the literature about the legal nature of the "use requirement" in Turkish law[461]. Some commentators have argued that being entitled to

[461] In the Turkish trademark law literature, scholars have characterized "use of trademark" in different ways. Without entering into discussion, we will use the term "requirement of use" in this thesis. For the scholars that used the term "requirement" or "necessity" of use ("kullanma zorunluluğu" in Turkish), see e.g. Tekinalp Ü.: Fikri Mülkiyet Hukuku, Genişletilmiş Beşinci Bası, İstanbul 2012, p. 459; Yasaman H./ Yüksel S.: Marka Hukuku, Yasaman et. al., 556 Sayılı KHK Şerhi, İstanbul 2004, pp. 628-629; Özarmağan M.: Marka Hakkının Kullanmama Nedeniyle Sona Ermesi, İstanbul 2008, s. 28; Özkök B.: Tanınmış Markanın Kullanılması Zorunluluğu ve Kullanılmaması Nedeniyle İptali, 2015 Ankara, s.100; Bilgili F.: Yargıtay Kararları Uygulamasında 556 Sayılı Markaların Korunması Hakkında KHK'ya Göre Tescili Markanın Kullanılması Zorunluluğu, TBB Dergisi, Sayı 74, 2008, s. 30; Karaca, sf. 27-31; Kaya B.: Markanın Kullanılması Zorunluluğu ve Kullanılmamasına Bağlı Sonuçları, Ankara 2019, p.12; Varol G.: Markanın Kullanılması Kavramı ve Kullanmamanın Sonuçları, İstanbul 2010, pp. 20-22. Also see the Preamble of the LIP which uses the same term in Art. 9.

On the other hand, some used the term "obligation of use" ("kullanma yükümlülüğü" in Turkish), see e.g. Arkan S.: Marka Hukuku, C. II, Ankara 1998, p. 145; Karahan S. et. al., Fikri Mülkiyet Hukukunun Esasları, 4. Bası, Ankara 2015, p. 186; Güneş İ.: Sınai Mülkiyet Kanunu Işığında Uygulamalı Marka Hukuku, Ankara 2018, s. 244.

Some others used "burden of use" ("kullanma külfeti/yüklentisi" in Turkish), see e.g. Dirikkan, p. 234; Kaya A.: Kullanılmama Sebebi ile Markanın İptali Kararının Etkisi ve İptal Davasında Usul Sorunları Üzerine, Prof. Dr. Hamdi Yasaman'a Armağan, İstanbul 2017, p. 376; Bozbel S.: Fikri Mülkiyet Hukuku, İstanbul 2015, pp. 433-435; Paslı A.: Uluslararası Antlaşmaların Türk Marka Hukukunun Esasına İlişkin Etkileri, İstanbul 2014, p. 541; Sönmez N.S.: 6769 Sayılı Sınai Mülkiyet Kanununa Göre Markanın Kullanılmaması Neticesinde Ortaya Çıkan Sonuçlar,İstanbul Hukuk Mecmuası, 76/1, 2018, 277–308, pp.

trademark right is not contingent on use, based on the fact that use is not required during registration[462]. On the contrary, some have contended that one must use the trademark besides registration in order to be entitled to trademark protection, in the existence of legal consequences attached to non-use[463]. Against the severity of the risks arising from the legal consequences of non-use which will be described below, it can be argued that being entitled to trademark right is contingent on application and registration, whilst continuity of such right depends on use and renewal[464].

There are several objectives underlying the requirement of use and legal consequences attached to non-use. The overall rationale can be explained as preventing the non-used trademarks to clutter the registry and avoiding unnecessary conflicts[465]. In

279,280.

[462] Tekinalp/Yüksel, p. 459; Sert S.: Markanın Kullanılması Yükümlülüğü, Ankara, 2007, p. 83; Bilgili p. 29. This argument was criticized by Karaca on the basis that it was articulated before the LIP, when the only direct consequence of non-use was revocation. Karaca contends that other legal consequences of non-use related to opposition, infringement and invalidation proceedings that were introduced in the LIP nullified this argument.

[463] Arkan, p.145; Dirikkan, p. 219. In Turkey's third party submission on WTO proceedings against Australian plain packaging measures, it was stated that Turkey has an actual use requirement in order to be eligible for the rights attached to trademark registration. In that vein, Turkey's official view on this matter leans toward this school of thought. See Panel Report – Addendum, (18-4060), 28 June 2018, Annex C-21, Executive Summary of the Arguments of Turkey, pp. C-70-75. ("Executive Summary of the Arguments of Turkey")

[464] Bozgeyik H.: Tescilli Markanın Kullanılması ve Kullanmamaya Bağlı Sonuçlar, Prof. Dr. Fırat Öztan'a Armağan, C. I, Ankara, 2010, p. 465.

[465] For consideration of requirement of use with regards to certain types of trademarks Turkish trademark law, see Bozgeyik, pp. 458-469; also see Dirikkan, pp. 222-223; Yasaman/Yüksel, pp. 642-644;

one of its decisions, the Court of Appeals' General Assembly of Civil Chambers explained this rationale as follows:

> *"by way of regulating a use requirement for trademarks, it was aimed to prevent the monopolistic right derived from the entirety of legal effects of registration within the scope of [the Law] from transforming the trademark registry to a non-used, obscure, secluded and an untouchable depository of trademarks*[466]*".*

The main sanction for non-use is revocation of trademark which is stipulated under Art. 9 as follows:

> *"If, within a period of five years following the date of registration, the trademark has not been put to genuine use in Turkey by the trademark proprietor in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the trademark shall be revoked, unless there are proper reasons for non-use.*
>
> *(2) The cases set out below shall also be deemed as use of trademark within the meaning of the first paragraph:*
>
> *a) Use of the trademark with different elements which do not alter the distinctive character of the mark;*
>
> *b) Use of the trademark on goods or on the packaging solely for export purposes.*
>
> *(3) Use of the trademark with the consent of the trademark proprietor shall be deemed to constitute use by the trademark proprietor."*

As seen from the first paragraph of this provision, it is provided that a trademark

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Özarmağan, pp. 64-69.

[466] (emphasis added) Court of Appeals' General Assembly of Civil Chambers, Decision No. E. 2010/11-695, K. 2011/47, 9 February 2011; also see Karaca, pp. 32-33.

which has not been used under certain conditions shall be revoked. According to the conditions set out in Art. 9, trademark should be genuinely used in Turkey for the products it was registered for. Such use must be performed by the owner of the trademark. In the following paragraph, it is further stipulated that "use of the trademark with different elements which do not alter the distinctive character of the mark", "use of the trademark on goods or on the packaging solely for export purposes" and "use of the trademark with the consent of the trademark proprietor" also constitute use of trademark. In this way, the law provides exceptions to the general principles mentioned in the first paragraph. Such exceptions that constitute use of trademark are limited to those mentioned in the second paragraph[467]. As stated in the preamble of the LIP, the exceptional clauses provided in the second paragraph was originated from the EU legislation.

The grace period determined in the law when the proprietor may not use the trademark is five years. If the trademark is not used in the said period after the date of registration, or if use has been suspended for a continuous period of five years, it shall be subject to revocation.

Among the principles related to use of trademark under Art. 9, the principle of "*genuine use*" deserves particular attention. In the preamble of the LIP, this concept was further elaborated on by noting that use should be made in accordance with the objectives of trademark registration and its functions. In other words, it should be made within the commercial life for the fulfilment of trademark's functions[468]. That being said, trademark

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[467] Tekinalp, p. 460; for an opposing view, see Çolak U.: Türk Marka Hukuku, İstanbul, 2018, p. 957.

[468] Tekinalp/Yüksel, p. 460; ECJ, Ansul BV v. Ajax Brandbeveiliging, Case C-40/01, 11 March 2003, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=85568&pageIndex=0&doclang=en&mode=req&d

should be put to use in a way that can perform the main functions of trademark as pointed out in the literature, namely to distinguish the goods or products that it is affixed on from those of others, to indicate source, to guarantee and to advertise[469]. The most important threshold for trademark use in accordance with its functions is the perspective of the "average consumer" of the relevant products or services[470]. Trademark should be used in a way that can be identified by the average consumer as a distinguishing element with regards to the products or services of the producer from those of others[471]. Another aspect of genuine use requires trademarks to be used for commercial purposes. Evaluation of commercial purpose should be made objectively depending on the factual background of each case[472]. According to the case law and literature, elements such as trade volume and market share of the proprietor, commercial value of the products that the trademark is used for, the number of average consumers for those products or services, the time period when the trademark has been put to use and the frequency of use should be considered in that respect[473].

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ir=&occ=first&part=1&cid=1159080> (last accessed: 30.12.2019).

[469] Çolak, pp. 16-18; Tekinalp/Yüksel, pp. 18-20.

[470] Oğuz, p. 24.

[471] Dirikkan, p. 237.

[472] Çolak, p. 957.

[473] Karaca, pp. 45-50; Bozgeyik, pp. 470-471; Tekinalp, p. 460; Çolak, p. 957; Dirikkan, p. 244; Arkan, p. 147; Ünsal Ö.E.: Markanın Kullanımı Kavramı, Kullanmama Savunması Müessesesi ve Avrupa Birliği Kurumlarının Bu Hususlardaki Değerlendirmeleri, IPR Gezgini, <https://iprgezgini.org/2017/07/25/markanin-kullanimi-kavrami-kullanmama-savunmasi-muessesesi-ve-avrupa-birligi-kurumlarinin-bu-hususlardaki-degerlendirmeleri/> (last accessed: 30.12.2019); Gürkaynak G./Uluay T.: A Case-Law Study on Justification of Non-Use Of a Trademark, Mondaq, available at:

c. Registered Trademarks That Cannot Be Used Under the Plain Packaging Measures

As mentioned earlier, plain packaging restrictions on the use of brand and variant names basically prohibit placement of anything other than words on tobacco products and packaging. Accordingly, trademarks consisting of any figures, colours or numbers can no longer be used on tobacco products. What this ultimately means is that the majority of trademarks registered in Turkey under Class 34 cannot be used on the related goods anymore, because they are comprised of figurative or composite marks that mostly include combinations of the figurative and verbal elements. The tobacco companies are only permitted to use word marks, in the form of brand and variant name that differentiates the products. However, use of any stylized element in a word mark such as the font and colour are prohibited as well.

Against this background, while measures at issue do not technically forbid the use of trademarks by allowing the use single-type word marks, it can be argued that they deprive the tobacco companies of the right to freely design marks to differentiate their products. Arguably, their freedom to create distinctive marks were considerably restricted as they are only left with one element to choose from, that is brand or variant name. It is of further importance to note that such figurative and composite marks of tobacco companies are not only prohibited to be used on the tobacco products and tobacco packaging. Due to the comprehensive tobacco control measures implemented in Turkey, including prohibitions on advertising and sponsorship as well as brand stretching and

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<http://www.mondaq.com/turkey/x/818228/Trademark/A+CaseLaw+Study+On+Justification+Of+NonUse+Of+A+Trademark> (last accessed: 30.12.2019).

sharing, these trademarks cannot be used anymore at all.

More importantly, considering afore-mentioned principles related to use of trademark, plain packaging measures arguably rendered it impossible for tobacco companies to use their registered trademarks (other than simple word marks) in accordance with the principles under Turkish trademark law. For one, these trademarks cannot be used on the goods that they were registered for in Turkey. It would be hard to argue that tobacco companies have any legal means to use them in a way that could perform the "*essential function*" of trademark, that is to distinguish the product from the others[474]. Consequently, it seems that tobacco trademarks cannot be genuinely used in Turkey anymore within the meaning of Art. 9 of the LIP.

3. Legal Consequences Attached to Non-Use

a. Revocation of Trademark

The most significant consequence is the revocation of the non-used trademark. In Turkey, non-use of a trademark for a period of five years may result in revocation of the trademark pursuant to Art. 9 of the LIP which was already explained above[475].

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[474] Yasaman has contended that plain packaging annihilates trademark's function of distinguishing. See Yasaman H.: Marka Kullanılmasında Kısıtlamalar, Marka Hukukunda Güncel Gelişmeler Sempozyumu, İstanbul 2013, pp. 78-98, at. p. 97.

[475] Although revocation of non-used trademarks was introduced in the Art. 14 of the Decree No. 556, the related provision was annulled by the decision of the Constitutional Court on 6 January 2017. Only four days after the said decision, LIP entered into effect which promulgated Decree No. 556. LIP also contained a provision concerning revocation of non-used trademarks. The four-days gap between the annulment

The principles with regards to revocation of trademarks were determined in the LIP in accordance with the EU legislation[476]. Art. 9 of the LIP is a reflection of the "*absence of genuine use as ground for revocation*" clause in the EU Directive 2015/2436[477]. It specifies certain conditions for use of trademarks and places sanctions in case a trademark is not used under these conditions, provided that such non-use was not based on a proper reason. The ultimate sanctions prescribed by this provision are revocation of trademark and removal from the trademark registry. According to Art. 26 of the LIP, the trademark can be revoked upon request of any interested parties on the grounds that it was not used[478].

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decision and the LIP's entry into force date created a conundrum with regards to revocation actions. For an overview of this discussion, see Oğuz A.: Markanın Kullanmama Nedeniyle İptali Konusunun Yeni Sınai Mülkiyet Kanunu Hükümleri Çerçevesinde Değerlendirilmesi, Terazi Hukuk Dergisi 12 (128), 2017, pp. 21-31. In line with the views of Oğuz, the Court of Appeals rendered a decision on 14 June 2019 that settled the issue by ruling that related LIP provisons should apply retroactively, including the mentioned four-days gap. For the decision, see CoA, 11th Civil Chamber, Decision No. E. 2019/1765, K. 2019/4921, 14 June 2019, available at < https://www.lexpera.com.tr/ictihat/yargitay/e-2019-1765-k-2019-4421-t-14-6-2019>. (last accessed: 30.12.2019)

[476] Bahadır Z.: Markaların İdari İptal Prosedürü, Ankara Barosu Dergisi, 2018/01, pp. 87-88.

[477] EU Directive 2015/2436, 23 December 2015, L. 336/1 (Directive (EU) of the European Parliament and of the Council of 16 December 2015 to Approximate the Laws of the Member States Relating to Trade Marks), Section 4, Art. 19; EU Regulation 2017/1001, 16 June 2017, L. 154/1 (Regulation (EU) of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (Codification), Section 3, Art. 18. At the time when the LIP was issued, EU Regulation 2017/1001 was not yet in force. Therefore, the preamble of the LIP refers to: EU Regulation 2015/2424, 24 December 2015, L. 341/21.

[478] As per Provisional Article 4 of the Law on Industrial Property, the authority to revoke trademarks under Art. 9 will be used by courts until 10.01.2024. The revocation decisions given by courts are ex-officio sent

The final decisions concerning revocation of the trademark is effective for everyone[479]. As a general rule, the decision for revocation takes effect on the date when request for revocation is submitted[480]. However, in the exceptional circumstances in which the conditions for revocation have occurred at an earlier date, revocation decision may be decided to take effect at such date, upon request of the applicant. In other words, although the revocation decisions are prospective as a general rule, they can also be decided to apply retrospectively in exceptional circumstances. Upon finalization of the revocation decision, the trademark is removed from the trademark registry[481].

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to the Office upon finalization. Art. 26(2) of the LIP provides that "*any interested parties*" can apply for revocation. There is no indication as to the scope of interested parties in the law or the preamble. This ambiguity has led to differing opinions on the interpretation of who can be considered as an interested party. According to Karaca, any natural or legal persons as well as public authorities including public prosecution offices, that has reasonable and realistic reasons to be concerned about the conditions that may lead to revocation of a trademark can be entitled to apply for revocation, see Karaca, p. 81; Additionally, Güneş opines that the "legal interest" sought for the applicants must be interpreted broadly to the extent that the applicant does not act for the sole purpose of damaging the trademark owner or there is an abuse of right, see Güneş, pp. 262-263. Also see, Çolak, p. 1031; Bahadır, pp. 89-90.

[479] LIP, Art. 27(5).

[480] Such request is submitted to the Turkish Patent and Trademark Office During the transition period that will last until 10.01.2024, the effective date is the date when the request for revocation is filed at the competent court.

[481] LIP, Art. 27(7).

b. Other Legal Consequences of Non-Use

There are three other consequences of non-use under Turkish trademark law. The first one concerns the opposition proceedings against trademark registration based on an earlier trademark. According to Art. 19(2) of the LIP, in the event that a registration is opposed based on an earlier trademark registration, the applicant is entitled to request the opposing party to prove that the earlier trademark has been genuinely used on the related products or services[482]. In such case, the opposing party is required to prove that the earlier trademark was genuinely used in the prescribed period; or there were proper reasons for non-use. If the opposing party fails to prove so, the opposition shall be rejected, meaning that non-use of a trademark under the circumstances described above may result in the loss of proprietor's ability to prevent registration of similar or identical trademarks.

The second consequence relates to proceedings seeking declaration of invalidity of a trademark. By virtue of Art. 25(7) of the LIP, in the event that an invalidation claim is filed against a registered trademark based on an earlier trademark, the respondent can assert the non-use defense based on the above-mentioned conditions specified in Art. 19(2). Lastly, the respondent can use a non-use defense similarly in infringement proceedings as per Art. 29(2) of the LIP. Upon request of the respondent, the owner of

[482] As per Art. 19(2) of the LIP, if the trademark of the opposing party has been registered for at least five years at the date of registration application or date of priority of the application for which the opposition is filed, the applicant can request the opposing party to furnish proof that the earlier trademark has been put to genuine use on the goods and services related to the opposition during the five-years period preceding the date of application or the date of priority of the latter application.

the earlier trademark must prove use in the prescribed period in a similar manner[483]. That being said, non-use of a trademark hinders the ability of trademark owners to prevent acts of infringement as well.

Furthermore, there are two indirect (or secondary) legal consequences attached to non-use of trademarks under the LIP that worth mentioning[484]. As opposed to those mentioned above, these were not provided in the law as direct sanctions attached to non-use. The first one relates to Art. 6(8) which grants an opposition right to trademark owners whose trademark protection has expired due to non-renewal[485]. By virtue of this provision, owners of a trademark whose registration has expired is able to oppose new applications based on the expired registration for two years. The pre-requisite of being entitled to this right is to continue using the previous trademark after the expiration date. To that end, if the earlier trademark has not been used after the expiration date, the proprietor cannot be entitled to use the mentioned opposition right.

The other secondary consequence is related to registrability of trademarks. Art.

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[483] In these cases, the owner of the earlier trademark is mandated to prove use in the five-years period preceding the date when the proceedings commenced, upon request of the respondent. Furthermore, in the event that the earlier trademark has been registered for at least five years at the application date or date of priority right of the challenged trademark, the respondent is required to prove use during the mentioned period as well. See LIP, Art. 25(7).

[484] Karaca, pp. 124-131.

[485] Art. 6(8) of the LIP reads as follows: *"An application for registration of a trademark identical to or similar to a registered trademark with identical or similar goods or services, that is filed within two years following the expiration of the protection of the registered trademark due to non-renewal shall be refused upon opposition of previous trademark proprietor provided that the trademark has been used during this period."*

5(1) of the LIP lays down twelve absolute grounds for refusal in trademark registration. As a general principle, in the existence of one these grounds, TürkPatent shall refuse the trademark application. Furthermore, if a trademark is duly registered albeit the existence of one these grounds, it shall be subject to invalidation proceedings as per Art. 25.

The LIP provides certain exceptions to these general principles with regards to three of the absolute grounds stipulated under Art. 5(1) that are: *"Signs which are devoid of any distinctive character", "Signs which consist exclusively or includes as an essential element of signs or indications which serve in trade to designate the kind, type, characteristics, quality, quantity, intended purpose, value, geographical origin, or the time of production of goods or of rendering of the services or other characteristics of goods or services",* and *"Signs which consist exclusively or includes as an essential element of signs or indications used by everyone in the trade area or which serves to distinguish members of a particular professional, vocational or commercial group from others."* As per Art. 5(2), an application for a trademark that acquired distinctive character for the related products or services by means of being used before the application cannot be refused on the above-mentioned grounds. To that end, in terms of protection of trademarks which are not inherently distinctive, use is essential. Furthermore, by virtue of Art. 25(4), in case a trademark that falls into one of the three mentioned absolute grounds was registered, it cannot be invalidated if it has acquired distinctiveness in the above-mentioned way through use after registration. Based on these provisions, use of trademark serves as a means to secure trademark registration in these exceptional conditions. Therefore, another secondary consequence of non-use is for the trademark to be subject to invalidation due to not being able to acquire distinctiveness through use.

4. Non-Use of Trademarks Due to Plain Packaging Measures

We have described above how the measures at issue prohibited the use of most of the tobacco companies' trademarks registered in Turkey. We have also discussed the use requirement provided in the Turkish trademark legislation and the severe consequences attached to non-use. As a matter of fact, the proprietors of these trademarks have lost a significant portion of the legal means to protect their registered trademarks[486]. Against this background, the adoption of plain packaging left tobacco industry no chance to use their trademarks in compliance with the "use requirement" stipulated under the Turkish law. As a result, tobacco-related trademarks that were prohibited to be used as per the plain packaging scheme after 5 January 2020 may be subject to afore-mentioned legal consequences. Considering that afore-mentioned primary consequences may apply after a continuous period of five years, they might be applicable for tobacco trademarks after 5 January 2025.

On the other hand, it is provided in the LIP that a trademark cannot be revoked in the existence of proper reasons. In that vein, tobacco companies will have a chance to argue that they had proper reasons for not using them. It will thus be critical whether non-use of these trademarks can be considered under the "proper reasons" exemption.

[486] Bozgeyik lists the means to protect the right arising from trademark registration as follows: renewal of the registration, use of the registered trademark, preventing similar applications or registrations via objection and invalidation procedures and preventing infringing acts. See Bozgeyik, p. 465.

a. Concept of Proper Reasons That Justify Non-Use

It is stated in Art. 9(1) that trademarks shall not be revoked if there are "proper reasons" for non-use. Similarly, according to Art. 19(2) and Art. 25(7), it is provided that the owner of the earlier trademark must either use the trademark or has had proper reasons for non-use. Accordingly, a trademark owner can justify non-use and avoid the related legal consequences by submitting proper reasons. However, what is meant by such reasons was not defined in the mentioned provision[487]. The preamble of the LIP defines "proper reasons" to the extent that they are "legal or actual obstacles that render the use of trademark impossible". It is also stipulated that such obstacles shall not arise from wrongful acts of the trademark owner. Whilst laying out these conditions, the explanations in the preamble do not clearly define or determine the extent of "proper reasons" concept either.

The EU legislation that form the basis of the LIP does not contain further explanations with regards to proper reasons either. The Paris Convention provides that the trademark owner may prevent cancellation due to non-use as long as he can "justify his inaction[488]". Nonetheless, there are no further explanations concerning justifiability. On the other hand, Art. 19(1) of the TRIPS Agreement entitled "Requirement of Use"

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[487] The wording of the provisions of the LIP actually involves the phrase "*haklı nedenler*" which can be literally translated as "justifiable reasons" or "legitimate reasons". However, probably because the mentioned clause had been originated from the EU Legislation, the phrase was translated into the English version of the law as "proper reasons".

[488] Art. 5/C (1) of the Paris Convention reads as follows: *"If, in any country, use of the registered mark is compulsory, the registration may be cancelled only after a reasonable period, and then only if the person concerned does not justify his inaction."*

provides that:

> *"If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use."*

As it is seen, TRIPS requires "valid reasons" that can prevent revocation for non-use to arise out of the will of the owner of trademark. It also provides non-exhaustive list of valid reasons that are "import restrictions on or other government requirements for goods or services protected by the trademark"[489].

It is commonly acknowledged in the literature that assessment of proper reasons should be made subjectively on each dispute depending the related facts[490]. Legal or actual obstacles that render the use of trademark impossible constitute proper reasons as long as they arise out of the will of the trademark owner[491]. In this respect, the most common reasons that justify non-use are force majeure events that restrict the production activities such as natural disaster, war or economic crisis. Furthermore, in connection

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[489] Voon and Mitchell highlighted the use of "such as" in Art. 19(1) when arguing that it provides a non-exhaustive list. See Voon/Mitchell, Implications of WTO Law, p. 117.

[490] Çoşğun G.: Sınai Mülkiyet Kanunu Kapsamında Markanın Kullanılması, Ankara 2018, p. 59; Oğuz, p. 26; Karaca, p. 69; Özarmağan, p. 50.

[491] Bozgeyik H.: Tescilli Markanın Kullanılması ve Kullanmamaya Bağlı Sonuçlar, Prof. Dr. Fırat Öztan'a Armağan, C. I, Ankara, 2010, pp. 471-473; Karaca, p. 71; Kaya A.: Marka Hukuku, İstanbul 2006, p. 202;

with the exemplary reasons provided under Art. 19 of the TRIPS Agreement, bureaucratic obstacles such as embargo or customs requirements as well as import restrictions can justify non-use[492]. All in all, the most important criteria are that each specific reason must be liberated from the trademark owner's intention and must have a direct relationship with non-use of the trademark[493]. In fact, in one of its decisions, CJEU ruled that the use requirement must be read as "*meaning that obstacles have a direct relationship with a trade mark which make its use impossible or unreasonable and which are independent of the will of the proprietor of that mark constitute 'proper reasons for non-use' of the mark*[494]".

In its precedence of limited number with regards to non-use of trademarks, it can be seen that the Turkish Court of Appeals (CoA) has generally considered the concept of "proper reasons" to apply in limited circumstances in which the owners have no opportunity left to utilize their trademarks in any way[495]. The CoA has considered, for example, that financial difficulties, even in the existence of bankruptcy or concordat of the trademark owner or seizure of trademark owners' assets did not constitute proper reasons[496]. Similarly, justification arguments based on fire outbreak in the company

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[492] Yasaman/Yüksel, p. 649; Dirikkan, p. 259; Arkan, p. 148.

[493] Özarmağan, s. 47; Çolak, p. 973.

[494] CJEU, Armin Häupl v Lidl Stiftung & Co. KG, C-246/05 Judgement of 14 June, available at: <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=2C4CD01416C0B3AAF330D8ABD509ADBF?text=&docid=60995&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4447593>. (last accessed: 30.12.2019)

[495] For a study on CoA case law regarding proper reasons for non-use, see generally Gürkaynak/Uluay.

[496] CoA, 11th Civil Chamber, Decision No. E. 2001/844, K. 2001/3429, 9 January 2001; Decision No. E. 2007/10093, K. 2008/13302, 24 November 2008. For the decisions, see Çolak, pp. 974-975.

factory or pending administrative procedures for manufacturing license were ruled out by the court[497]. The court considered that the obstacles to use trademark must be impossible to be foreseen or overcome by the trademark owner.

b. Whether Plain Packaging Measures Constitute Proper Reasons

The case law on the proper reasons generally relate to circumstances which are applicable to the manufacturing or sales of the product in question. On the other hand, plain packaging creates obstacles that impact use of trademarks. In the meantime, there are no actual obstacles on manufacturing or trading of tobacco products. Considering this unique nature of plain packaging, it is hard to think of any other regulatory measure that resembles to it in terms of restricting trademark use. However, there is one reported decision of the CoA in a similar context which has not been made publicly available yet. Reportedly, the case was based on an infringement claim, where the defendant made a counter-claim of non-use. The earlier trademark has not been used in Turkey since it was registered in 2001 in class 33. Owner of the earlier trademark contended that there had been proper reasons for non-use due to regulatory prohibitions on the exportation and sales of the specific product (cocktail beverage containing distilled alcohol) that the trademark has been registered for in Turkey. The first instance court ruled that such regulatory restrictions constituted proper reasons indeed. The decision was reportedly upheld by the CoA as well in December 2018[498]. This unpublished case could indicate

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[497] CoA, 11th Civil Chamber, Decision No. E. 2009/5669, K. 2010/12171, 29 November 2010; Also see Kaya B., p. 68.

[498] For the article that reports the related decision, see: Köse M.Y.: Proper Reasons for Non-use in Turkey,

that a regulatory measure can be considered to constitute a proper reason. However, the restriction imposed by the mentioned measure prohibits the sales of the related product, whereas sales of tobacco products are still allowed. In this manner, the implications of this case cannot directly be associated with plain packaging.

Commentators that considered the compatibility of plain packaging with the use requirement stipulated in the TRIPS Agreement and EU law opined that plain packaging constitutes "proper reason" or "valid reason"[499]. In the literature on Turkish trademark law, Karaca considered bans on advertisement of tobacco and alcohol products and opined that they amounted to a proper reason for non-use in advertisements[500]. In that case, however, trademark owners were not deprived of the ability to use trademarks on the retail points, so they were able to demonstrate use through packages. In several recent studies that took account of plain packaging, it was argued that plain packaging should constitute proper reasons for tobacco companies indeed[501]. Nevertheless, in the absence of a clear provision directly related to plain packaging, it is unclear how TürkPatent and the courts will consider this issue, once the five-years grace period ends for tobacco-related trademarks.

Marques-Class 46, available at: <https://www.marques.org/blogs/class46/?XID=BHA4721> (last accessed: 30.12.2019).

[499] For an opinion on TRIPS Agreement, see: Malbon J./Lawson C.A./Davison M.J.: The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, A Commentary, Cheltenham, UK 2014, p. 316. For an opinion on EU Laws, see: Bonadio E.: Plain Packaging of Tobacco Products under EU Intellectual Property Law, European Intellectual Property Review, 34(9), pp. 599-608, p. 6.

[500] Karaca, p. 71.

[501] Kaya B., p. 71; Aras M.: Markanın İptali ve İptal Halleri, İstanbul 2019, p. 109; Altın B.İ.: Devletin Markaya Müdahelesi, İstanbul 2019, pp. 162.

5. Assessment

We have first mentioned above that neither the plain packaging provision incorporated into the Law No. 4207, nor the provisions in the regulation prepared by the Ministry establish a link to the trademark legislation. Then we have discussed the issue of trademark use according to the trademark legislation. Although the legislation does not put trademark owners under an explicit obligation of using their trademarks, we have seen that it attaches several important consequences in case of non-use. On the one hand, registration and protection of trademarks are not contingent on use. But on the other hand, non-use simply leaves a trademark open to attack. The most severe consequence is revocation. A non-user further loses the ability to defend itself in infringement or invalidation cases. Thus, if a trademark is not put to genuine use in Turkey, the owner might lose all rights conferred by trademark protection.

Above, we have also took note of what types of trademarks cannot be used under the plain packaging scheme. We have established that most of the tobacco-related trademarks duly registered and protected in Turkey will not be used anymore. Taken together with the provision that regulate non-use of trademarks, for such trademarks to continue being protected in Turkey, plain packaging measures must be acknowledged as a “proper reason for non-use”. We have established, however, that the current legislation lacks any positive norm that would ensure that. The case law does not provide much relief either, as no other regulatory measure was implemented that restricted the use of trademarks in a similar manner to plain packaging. Thus, it cannot be considered in full certainty that tobacco-related trademarks will not suffer from the consequences attached to non-use.

Under these circumstances, it is hard to tell why the legislators did not include a

trademark-saving provision in the law. This is particularly curious considering the fact that the Australian legislation, which has undoubtedly been a guiding source for legislators in other jurisdictions, incorporates detailed provisions designed to preserve the existence of IP rights and to exempt them from consequences attached to non-use. We have seen in the second chapter of this thesis that such provisions helped Australia to refute many claims against plain packaging. It is dubious whether the case of the opposition would be stronger in the absence of such provisions. For these reasons, we are of the view that a trademark-saving provision should be added into the law.

C. CONSTITUTIONAL RIGHTS

Due to the restrictions on trademark use instituted by plain packaging measures, tobacco companies may put forward that some of their fundamental rights protected under the Turkish Constitution were wrongfully restricted with the adoption of plain packaging laws. It is indeed plausible that the prohibition on the use of trademarks has the effect of restricting several fundamental rights and freedoms protected in the Turkish Constitution. As per Art. 13 of the Turkish Constitution,

> *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

The above-mentioned provision determines certain conditions for the adoption of laws that have the effect of restricting fundamental rights and freedoms. Below, we will describe the provisions of Turkish Constitution that cover right to property and freedom

of work and contract, as we find them relevant for the case of plain packaging[502]. We will then explain the restrictions imposed on them by the plain packaging measures; and try to briefly explore the general principles that would be considered under the above-mentioned provision when they are restricted.

1. Right to Property

a. Generally

Some of the main arguments against plain packaging measures have been based on the property rights on trademarks that can no longer be put to use. Consequently, it could be speculated that, governments' adoption of such measures amount to an "expropriation", "acquisition" or "deprivation" of the property rights of tobacco companies that own trademarks. Indeed, we have seen in the Australian example that the tobacco companies challenged the constitutionality of the Australian Act on the basis that it amounted to an acquisition of IP rights[503]. Therefore, the relevant provision in the Turkish Constitution that protects right to property should be explored[504].

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[502] For a study that considered possible impact of plain packaging measures on fundamental rights and freedoms under Turkish Constitution, see İzgi G.: Düz Paketleme (Plain Packaging) Uygulamasının Fikri Mülkiyet Hukuku Açısından Değerlendirilmesi, Ankara Barosu Fikri Mülkiyet ve Rekabet Hukuku Dergisi, 2015/2, Ankara 2015, pp.43-46.

[503] See above § Ch. 2 (II)(B).

[504] Although there is a provision under Turkish Constitution that specifies "expropriation" and determines the circumstances in which the state can expropriate property, it is explicitly limited to expropriation of immovable property. Therefore, we think that plain packaging measures do not fall within this provision.

Right to property is among the fundamental rights protected under the Turkish Constitution of 1982. It is governed by Art. 35 of the Turkish Constitution that reads:

"Everyone has the right to own and inherit property.

These rights may be restricted by law only in view of public interest.

The exercise of the right to property shall not contravene public interest."

As per the above-mentioned provision, although it is stipulated that everyone enjoys right to property, the state is able to limit this right by law as long as it serves a public interest. It is thus accepted within this provision of the Constitution that the state can control and regulate the use of right to property for the purposes of public interest. In doing so, the state must comply with general principles on restriction of fundamental rights and freedoms under Art. 13. Two provisions read together, right to property can only be restricted by law with due regard to public interest and within the confines of Art. 13.

b. Whether Plain Packaging Measures Restrict Right to Property

As discussed in detail above, Turkish plain packaging rules prohibited the use of many tobacco-related trademarks duly registered and protected in Turkey. In light of the previous tobacco control laws of Turkey as described above, use of tobacco-related trademarks had been only allowed to be used on the packaging in the presence of bans on advertising, promotion, sponsorship and brand sharing. Thus, it can be argued that the trademarks owned by tobacco companies were rendered completely useless and worthless with the adoption of plain packaging. Within this context, tobacco companies may argue

See Art. 46 of the Turkish Constitution.

that their right to property, in form of trademarks, were restricted unconstitutionally.

In order to evaluate whether plain packaging laws can be considered as a limitation of right to property under Art. 35 of the Constitution, we must answer two questions: whether intellectual property fall under the protection of right to property; and whether prohibiting the use of trademarks while the proprietary rights remain in the owner of such trademarks constitute a restriction of right to property under Art. 35.

aa. Whether Intellectual Property is Covered by Right to Property under Art. 35

The Turkish Constitution does not explicitly grant protection for IP. However, the "property" as protected under Art. 35 must be interpreted in a way that covers IP. Indeed, in its recent decisions concerning the constitutionality of laws governing trademark rights, the Constitutional Court found that the subject of right to property consists of tangible and intangible assets[505]. Based on the explanation that intangible assets include intellectual and industrial property rights, the Court accepted that limitations on IP rights, such as trademarks, must be made in conformity with Art. 35 of the Constitution[506].

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[505] Decision of the Constitutional Court, 2004/81 E., 2008/48 K., Official Gazette No. 26822, 31 January 2008; Decision of the Constitutional Court, 2016/148 E., 2016/189 K., Official Gazette No. 29940, 6 January 2017.

[506] In its precedent prior to the above decision of 2008, the Constitutional Court did not consider intellectual property to be included in the protection of "right to property" under the Constitution. For an overview of the Court's interpretation of intellectual property rights, see Gemalmaz H.B.: Mülkiyet Hakkı, Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi – 6, 2018 Ankara, pp.33-40; Akça K.: Anayasa Mahkemesi Kararlarında Mülkiyet Hakkı, İnönü Üniversitesi Hukuk Fakültesi Dergisi Özel Sayı C:1,

Therefore, it must be accepted that owners of tobacco trademarks enjoy right to property under the Turkish Constitution.

bb. Whether Restrictions on the Use of Property Constitute a Restriction on Right to Property within the Meaning of Art. 35

Albeit the absence of a trademark-saving provision, the plain packaging laws do not entirely take away the proprietary rights to trademarks. The problem is, while the proprietors maintain their trademarks, they are not allowed to use them anymore. Hence, the main question is whether limiting the "use of property" would amount to a restriction within the meaning of Art. 35 of the Constitution.

As mentioned above, the first sentence of Art. 35 provides that "everyone has the right to own and inherit property". So, it is not explicitly stated whether the protection granted by the Constitution for right to property includes a "right to use". Nevertheless, in its precedent, the Constitutional Court have considered that right to property entails positive rights such as: right to use the property as it is, right to enjoy the fruits of the property being used and right of disposition[507]. It was ruled that the proprietors can freely exercise these rights unless it does not interfere with other people's rights or violates the limitations imposed by law. Therefore, the Constitutional Court found that limitations on

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Malatya 2015, p. 556-560. Also for the Court's earlier take on the subjects of the provision that left out IP rights, see Decision of the Constitutional Court, No. 1967/10 E., 1967/49 K., 28 December 1967.

[507] See Decision the Constitutional Court, Mehmet Akdoğan and others (individual app), No. 2013/817, 19 December 2013. ("Akdoğan and others"), para. 32; Decision of the Constitutional Court, No. 2018/136 E., 2019/21 K., 10 April 2019, Official Gazette No. 30807 of 20 June 2019.

the exercise of any of the above-mentioned rights would constitute an interference to right to property.

Against the foregoing explanations, we can conclude that plain packaging laws indeed restrict right to property, as they limit the use of certain trademarks. Indeed, the right at issue is not an absolute right, as the second sentence of Art. 35 states that it can be "limited by law in view of public interest". Furthermore, in the last sentence of Art. 35 that governs right to property, it is prescribed that "the exercise of the right to property shall not contravene public interest". To ensure that no right of property is exercised against public interest, it is accepted that the state is required to control and regulate such exercise[508]. This provision, thus, impliedly gives authority to the state to control the use of property for public interest[509].

Diversely, tobacco industry might argue that plain packaging measures go far

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[508] Although Art. 35 does not explicitly provide that the state has the right to regulate and control the use of property, it is provided under the European Convention on Human Rights that Turkey is party to, in the following provision entitled "Protection of Property":

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Paris, 20.III.1952.

[509] See e.g. Decision of the Constitutional Court, No. 2018/9 E., 2018/84 K., 11 July 2018, Official Gazette No. 30596 of 15 November 2018; Decision of the Constitutional Court (individual application), Recep Tarhan and Afife Tarhan, No. 2014/1546, 2 February 2017, para. 57.

beyond controlling the use of property and cause deprivation of their possessions of trademarks. In fact, the Constitutional Court has adopted ECtHR's approach on right to property, that is comprised of three distinct rules[510]. According to this approach, the right to property consists of: peaceful enjoyment of possessions, deprivation of possessions, and control of use[511]. This approach requires the Court to determine which one of these rules does the subject interference concern. Depending on the rule that the subject interference concerns, there are different criteria sought concerning proportionality of the measure. Generally, interferences that amount to deprivation of possessions may require the state to indemnify the proprietor, while in case of control of the use of property, compliance with procedural guarantees are deemed sufficient for the state to lawfully restrict right to property[512]. Furthermore, state's margin of appreciation is generally considered narrower when the subject interference considers deprivation of possession[513]. Therefore, in case of a legal challenge, tobacco industry could be expected to contend that plain packaging amounted to deprivation of their possession of trademarks. They can further contend that the encumbrances imposed on the use of their trademarks should be considered under the first rule which concerns peaceful enjoyment of possessions[514].

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[510] Gemalmaz, Mülkiyet Hakkı, p.5.

[511] See ECtHR, Sporrong and Lönnroth v. Sweden, App. Nos. 7151/75 and 7152/75, Judgment of 23 September 1982, Series A No. 52.

[512] Gemalmaz, Mülkiyet Hakkı, p. 101.

[513] Decision of the Constitutional Court (individual app.), Mahmut Üçüncü, No. 2014/1017, 13 July 2016, para. 70.

[514] This is also a plausible argument considering that the ECtHR and the Turkish Constitutional Court tend to invoke the first rule in cases when the subject measure does not clearly fall under the second or the third rule due to the complexities of the factual matrix of the case. See Gemalmaz, Mülkiyet Hakkı, pp. 113-116.

Nonetheless, we think that it is plausible for the Court to consider the subject measures to constitute "control of the use of property", rather than a deprivation, given that tobacco companies maintain the legal title to their trademarks[515].

To summarize, the jurisprudence of the Constitutional Court as well as the ECtHR indicate that plain packaging measures amount to restriction of right to property by controlling the use of trademarks. Under the Turkish Constitution, right to property is not absolute and can indeed be restricted by the state. However, when doing so, the state must comply with the main principles under the Constitution. To that end, it should be explored whether the plain packaging laws are in accordance with the principles and conditions set out in the Constitution. Below, we will try to briefly provide an overview on those principles and conditions; and consider them with regards to plain packaging measures.

[515] In fact, in the case concerning UK's plain packaging measures, the Court of Appeal of England found that the plain packaging regulations were a 'control of use' rather than a "deprivation of property". For a summary of the decision, see Zhou S.: Court of Appeal upholds UK plain packaging judgment, 16 December 2016, available at <https://www.mccabecentre.org/news-and-updates/court-of-appeal-upholds-uk-plain-packaging-judgment.html> (last accessed: 30.12.2019). For the court decision, see British American Tobacco UK Ltd & Ors, R (on the application of) v The Secretary of State for Health [2016] England and Wales Court of Appeals Civil Division 1182 (30 November 2016), available at < http://www.bailii.org/ew/cases/EWCA/Civ/2016/1182.html> (last accessed: 30.12.2019).

c. Whether Plain Packaging Laws Conform with Conditions for Restricting Right to Property

aa. Principle of Lawfulness

As described above, Art. 13 of the Constitution sets out the general principles for the restriction of fundamental rights and freedoms. First of all, it is provided that restrictions can only be made by law. This principle requires that interference with fundamental rights and freedoms can only be made by the legislative organ of the Turkish Government through the procedures laid down in the Constitution. Such restrictions cannot be made via regulations, by-laws, directives or such. Indeed, the general regulatory framework of plain packaging was enshrined in the Law No. 7151[516]. As mentioned earlier, while providing the general framework in about five paragraphs, the law authorized the Ministry of Agriculture and Forestry to regulate the details concerning the application of plain packaging measures. This is unquestionably compatible with the principle of lawfulness[517]. While the introduction of the subject measures complies with the principle of lawfulness, lack of any explanations as to the objectives of the said measures should be noted in terms of due process of restricting fundamental rights and freedoms. In fact, we will see below how this issue might cause problems in terms of constitutionality of the plain packaging measures[518].

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[516] See above § Ch. 3 (III)(B).

[517] Kapani M.: Kamu Hürriyetleri, Ankara, 2013, p.232; Soysal M.: 100 Soruda Anayasanın Anlamı, İstanbul, 1987, p.199.

[518] For several other issues concerning the principle of lawfulness, see Altın, pp. 151-152.

bb. Ground for Restriction: Public Interest

One of the important principles concerning the restriction of fundamental rights and freedoms is the ground for restriction. This principle was among the changes made in the Turkish Constitution in 2001[519]. The previous version of Art. 13 before the amendments constituted a two-tiered regime for grounds of restriction. In the said article, a number of general grounds for restriction were prescribed, namely "the indivisibility of the State; national sovereignty; republic; national security; public order; public interest; general morality; and public health". Additionally, it was provided that a fundamental right or freedom could be restricted on specific grounds enshrined in each provision governing the related right or freedom. Within this regime, it was accepted that the legislator had the authority to restrict any right or freedom in accordance with one or more general grounds; even if there was no specific ground of restriction for one right or freedom. To that end, the legislator was able to restrict any right or freedom protected by the Constitution insofar as other conditions were met. In the amended version of the article, the mentioned two-tiered regime was abolished and the general grounds of restriction were removed. Consequently, it was provided that restrictions can only be made "in conformity with the reasons mentioned in the relevant articles of the Constitution", i.e. on specific grounds related to each right or freedom.

Regarding the right to property, there is indeed a specific ground mentioned in Art. 35(2) which reads as: "*These rights may be restricted by law only in view of public interest."* Art. 35(3) further provides that "*The exercise of the right to property shall not*

[519] Law No. 4709 Amending Certain Provision of the Constitution of the Republic of Turkey, Official Gazette No. 24556 (repeated), 17 October 2011.

contravene public interest.[520]" Right to property, therefore, can be restricted on the sole ground of public interest.

In line with the public interest standard in the ECHR, it is accepted that Art. 35 covers both "public interest" and "general interest"[521]. Although there is not a uniform definition of public interest in the literature, it is widely accepted that the concept should be interpreted broadly[522]. The Constitutional Court have also considered that the legislator has almost an absolute margin of appreciation with regards to determining public interest[523]. An interference with right to property is therefore deemed to have public interest unless it is clearly devoid of a reasonable explanation. That being said, plain packaging measures should be considered to restrict right to property on legitimate ground of public interest, due to the underlying objectives of protecting public health[524].

[520] Although the phrase "public interest" was used in both of the paragraphs in the English translation of the Constitution, Art. 35(2) involves the phrase "*kamu yararı*", while Art. 35(3) contains "*toplum yararı*". However, the Constitutional Court has generally considered these standards as identical. See Gemalmaz, Mülkiyet Hakkı, p. 133.

[521] Decision of the Constitutional Court, Zekiye Şanlı (individual app.), No. 2012/931, Official Gazette No. 29130, 25 September 2014, para. 54

[522] Akça, p. 568.

[523] Akdoğan and others, para. 35.

[524] İbid, also see Decision of the Constitutional Court, Yunis Ağlar (individual app.), No. 2013/1239, 20 March 2014, para. 29; Nusrat Külah (individual app.), No. 2013/6151, 21 March 2016, para. 56.

cc. Principle of Proportionality

Principle of proportionality draws the limit for the restrictions of fundamental rights and freedoms in the Constitution[525]. There must be a fair balance between the restricting measure and the aims pursued to be realized. The proportionality test therefore includes assessment of two elements that are: the restrictions imposed by law on rights or freedoms; and the reasons for which the restrictions are applied. As mentioned earlier, the omnibus bill which incorporated plain packaging measures did not include any explanations as to the objectives of plain packaging. Although Art. 1 of the Law No. 4207 states the Law's general purpose, absence of specific reasons underlying measures related to packaging appear to be problematic when assessing the proportionality of the law. It appears that the Constitutional Court would be unable to identify the aims sought by the adoption of plain packaging by reading the legislation or its preamble. That being said, we will approach the objectives of plain packaging as mentioned in the first chapter of this study, including the general purposes of the measure and Turkey's obligations under the FCTC[526]. Additionally, certain duties of the state related to protecting human health provided in the provisions of the Turkish Constitution such as Art. 17 and Art. 56 may also be included in the reasons underlying the restriction when considering the balance. In fact, in its decision concerning the constitutionality of the smoking bans, the Constitutional Court gave weight to fulfillment of state's positive obligations to protect the public health under the Constitution; as well as the positive obligations Turkey

[525] Gemalmaz, Mülkiyet Hakkı, p. 139.

[526] See above, § Ch. 1 (2)(C).

undertook according to the FCTC[527]. On the other side of the scale, there are effects of the restriction imposed by the plain packaging measures on right to property. These effects are chiefly the encumbrance put on the use of trademarks. When considering how plain packaging interferes with right to property, the consequences attached to non-use of trademarks under the trademark legislation as described above must be taken into account.

The principle of proportionality is comprised of three sub-principles, that are adequacy, necessity and proportionality *stricto sensu*[528]. As per the adequacy principle, the means employed should be adequate or suitable to achieve the aims sought to be realized. In that sense, restricting the use of tobacco-related trademarks must be suitable to achieve the objectives underlying plain packaging measures. It is arguable that plain packaging fits into the comprehensive tobacco control measures aimed to reduce demand. The restriction applied on the trademarks can arguably contribute to the general objective of preserving public health pursed by general tobacco control policies of Turkey; and in particular Law No. 4207. Although the legislator did not refer to any studies that demonstrate the efficiency of packaging measures in Turkey, the studies submitted in the earlier examples such as Australia may be of guidance in supporting that plain packaging measures would be adequate to achieve the aims such as decreasing the attractiveness of the unhealthy products.

According to the necessity principle, the subject measure should be necessary for

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[527] Decision of the Constitutional Court, No. 2010/58 E., 2011/8 K., Official Gazette No. 27858, 26 February 2011.

[528] For Constitutional Court's take on the principle of proportionality, see Akdoğan and others, paras. 38-39.

the realization of the objective. This principle requires the legislator to implement the least restrictive measure that is adequate in achieving the objectives pursued[529]. In that respect, the test carried out by the WTO Panel on the alternative measures that are less-restrictive could be of guidance[530].

The final and probably the most important sub-principle is proportionality *stricto sensu* or "narrow proportionality"[531]. This principle requires the means that impose encumbrance on individuals' rights or freedoms should be proportionate to the aims sought. The Constitutional Court have generally judged the fair balance between the public benefits of the aims sought and individual burdens imposed by the measures under this sub-principle[532].

In light of the Court's interpretation of this principle, it can be said that when subject measure imposes an extraordinary and excessive encumbrance on the right to property, it cannot be considered proportionate *stricto sensu*[533]. That being said, the public and societal benefits of plain packaging measures should be considered against the restrictions imposed on the use of trademarks. In light of the limitations on the use of tobacco-related trademarks and the consequences attached to non-use of them, it is clear

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[529] Gözler K.: Sigara İçme Özgürlüğü ve Sınırları: Özgürlüklerin Sınırlandırılması Problemi Açısından Sigara Yasağı, Ankara Barosu Dergisi, 47-1, Ankara 1990, pp. 31-67.

[530] See above, § Ch. 2 (II)(D)(2)(c)(ff).

[531] Oğurlu uses the term "*narrow proportionality*" in Oğurlu Y., A Comparative Study on the Principle of Proportionality in Turkish Administrative Law, Kamu Hukuku Arşivi, İlhan Akın'a Armağan, 2003 (1), Y.6.

[532] Gemalmaz, Mülkiyet Hakkı, p. 142.

[533] Decision of the Constitutional Court, Alişen Bağcaçi (individual app.) No. 2015/18986, Official Gazette No. 30659, 18 January 2019, para. 50.

that the subject measure places a heavy burden on tobacco companies' individual rights. However, it is arguable that Constitutional Court would consider the objectives of plain packaging such as the improvement of public health superior to commercial interests of tobacco companies, as they benefit the whole public[534].

dd. Other Principles

Apart from the principles discussed above, a restricting measure should be in accordance with "the letter and spirit of the Constitution" and "the requirements of the democratic order of the society and the secular public". A restriction should also not infringe upon the essence of the related right or freedom. It might worth elaborating on the last principle in relation to constitutionality of plain packaging laws. The "essence of the right" can be described as an indispensable element of the subject right; and the essential core of it that would render the right meaningless when infringed[535]. From the perspective of trademark law, losing the freedom to use all trademarks other than simple word marks might arguably constitute an infringement on the essence of the right to property. For the subject measures to not infringe the essence of right to property, they should not restrict the tobacco companies' right to property as a whole and leave an essential core of it. In that respect, the fact that the owners of the related trademarks maintain the ownership and enjoy the exclusive rights conferred by trademark registration would be the key points in our opinion. This argument, of course, would be invalid in

[534] On the other hand, Altın opined that the restriction imposed by plain packaging on the right to property violates the Turkish Constitution. See Altın, pp. 149-161.

[535] Özbudun E.: Türk Anayasa Hukuku, Ankara 2014, pp. 117-120

case non-use of trademarks due to plain packaging laws would not be considered as a proper reason under the trademark legislation.

2. Freedom of Work and Contract

a. In General

Another assertion made by tobacco industry in several countries have been that the restrictions on trademark use interfered with freedom of expression or freedom to conduct business or trade[536]. In line with the reasons underlying these arguments, tobacco companies could invoke Art. 48 of the Turkish Constitution entitled "Freedom of Work and Contract" which reads as follows:

> *"Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free.*
>
> *The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability."*

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[536] For example, PM argued before the Constitutional Court of France that plain packaging disregarded freedom of private enterprises. See Constitutional Council [France], Loi de modernisation de notre système de santé [Law to modernize our health system], Decision n° 2015-727 DC of 21 January 2016, available at <https://www.conseil-constitutionnel.fr/decision/2016/2015727DC.htm> (last accessed 30.12.2019). For an overview of the legal challenges, see Tobacco Free Kids, Summaries of the Legal Challenges, available at <https://www.tobaccofreekids.org/plainpackaging/tools-resources/legal/case-summaries> (last accessed: 30.12.2019). Also for an argument that plain packaging restricts freedom of private enterprise, see İzgi, p. 44.

Although it mainly governs freedom of work and contract, Art. 48 entails a separate protection for the freedom of private enterprise. It can be described as freedom to engage in economic activities through an autonomous entity[537].

It is indeed arguable that an interference with the use of trademarks constitute restriction on private enterprises' freedom of work. To that end, it is worth mentioning a decision of the Constitutional Court on compatibility of a tobacco control measure with the mentioned freedom[538]. After the advertisement and promotion of tobacco brands had been banned for the first time in Turkey with the enactment of Law No. 4207, the Governor of Ankara issued a decision prohibiting an event organized by a tobacco company for the purposes of advertising and promotion of one of its products. The company then challenged the said administrative decision and argued that the decision should be annulled due to the unconstitutionality of the bans on advertisement and promotion. According to the claimant, considering that manufacturing and sales of tobacco products were legally allowed, placing an irrevocable and indefinite ban on advertising of these products that were on display within commercial life contradicted with constitutional freedom of work. It was contented that private enterprises' freedom of promoting their products could be prohibited under no circumstances by virtue of Art 48 on the basis that the provision covered not only the establishment of private enterprises but also sales and promotion. It was further contended that the ban imposed by the law did not amount to a reasonable and fair balance between the public benefit and commercial freedoms of the enterprises. In light of these, a complete ban on the advertising and promotion purportedly violated the constitutional limits of restricting

[537] Tiryaki R.: Ekonomik Özgürlükler ve Anayasa, Ankara 2008, pp. 162-165.

[538] Decision of the Constitutional Court, No. 1998/24 E., 1999/9 K., 13 April 1999.

freedom of work.

The Administrative Court took account of the Claimant's case and referred it to the Constitutional Court for its consideration of the arguments related to constitutionality. The Constitutional Court acknowledged that strictly prohibiting "all forms of advertising or promotion of tobacco products by using the product's or producer's company's name, logo or trademark" amounted to a restriction of private enterprises' freedom of work indeed. Nevertheless, the Court gave weight to the objectives of improving public health, environment and economy that justified the said restriction. The Court also took note of implementation of similar bans in modern countries on the basis that advertising and promotion of tobacco products negatively impacted the public health by encouraging smoking. Public health was one of the general grounds prescribed in Art. 13 for restricting any fundamental right or freedom at that time. The objective of improving public health, thus, constituted a legitimate ground for restricting tobacco companies' freedom of work. Considering that the means of restricting such freedom were not used misused by the legislator, the Court dismissed all claims.

Plain packaging measures are similar to the bans on advertising and promotion in terms of the means employed that restrict tobacco companies' commercial activities. They are arguably even more restrictive in nature insofar as they eliminate the final venue on which tobacco-related trademarks could be used, rendering the use of related trademarks impossible. In that respect, it can be argued that plain packaging laws interfere with freedom of work under Art. 48 as well.

b. Whether Plain Packaging Laws Conform with Conditions for Restricting Freedom of Private Enterprise

On the topic of right to property, we have discussed above the general principles and conditions specified in the Constitution related to restriction of constitutional rights and freedoms. First of all, we have mentioned the principle of lawfulness and concluded that the general rules concerning plain packaging measures were introduced through a law. Secondly, we have summarized the previous and current regimes of grounds for restriction as per Art. 13 of the Constitution. The current regime requires a restriction to be made on a ground specified in the related provision of the Constitution. Since Art. 35 that covered right to property set forth ground for public interest, we concluded that plain packaging measures could be justified since its objectives include protection of public health.

On the other hand, Art. 48 that governs freedom of work and contract does not explicitly provide for a ground that would justify a restriction on the said freedom. On a simple reading of the Constitutional provisions, it can be deduced that freedom of work and contract cannot be restricted in any circumstances[539]. Many scholars of constitutional law, however, have maintained that such freedoms were not absolute and they could still

[539] Criticizing the constitutional amendments made in 2001, Gözler contended that rights and freedoms of which the related provisions devoid of any specific ground for restriction could not be restricted any more. See generally Gözler K.: Anayasa Değişikliğinin Temel Hak ve Hürriyetlerin Sınırlandırılması Bakımından Getirdikleri ve Götürdükleri: Anayasanın 13'üncü Maddesinin Yeni Şekli Hakkında Bir İnceleme, Ankara Barosu Dergisi, 59-2001/4, pp.53-67.

be restricted due to the objective reasons inherent to their nature[540]. The Constitutional Court have not expressed a view regarding this conundrum arising from the amendments of 2001, but took a questionable approach with regards to restriction of freedom of work and contract in several cases. When considering the limits for restricting this freedom, the Court ruled that "public interest" is a legitimate ground for restriction, although Art. 48 does not refer to any ground whatsoever[541]. The Court have based this conclusion on the explanatory text of the Art. 48 of the Turkish Constitution that states "*[freedom of contract, choosing occupation and work] may be restricted by law in view of public interest.*[542]". Notwithstanding the legitimacy of the Court's exercise of basing its

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[540] Özbudun, pp. 114-115; Tanör B./Yüzbaşıoğlu N.: 1982 Anayasasına Göre Türk Anayasa Hukuku, İstanbul 2014, p. 139; Sağlam M.: Ekim 2001 Tarihinde Yapılan Anayasa Değişiklikleri Sonrasında Düzenlendikleri Maddede Hiçbir Sınırlama Nedenine Yer Verilmemiş Olan Temel Hak ve Özgürlüklerin Sınırı Sorunu, Anayasa Mahkemesi'nin Kuruluşunun 40. Yıldönümü Nedeniyle Düzenlenen Sempozyum, Antalya 2002, pp. 23-27; Sağlam F.: 2001 Anayasa Değişikliğinin Yaratabileceği Bazı Sorunlar ve Bunların Çözüm Olanakları, Anayasa Mahkemesi'nin Kuruluşunun 40. Yıldönümü Nedeniyle Düzenlenen Sempozyum, Antalya 2002, pp. 3-4; Fendoğlu T.: 2001 Anayasa Değişikliği Bağlamında Temel Hak ve Özgürlüklerin Sınırlandırılması (AY. md. 13), Anayasa Mahkemesi'nin Kuruluşunun 40. Yıldönümü Nedeniyle Düzenlenen Sempozyum, Antalya 2002.

[541] Decision of the Constitutional Court, No. E. 2003/70, K.2005/14, Official Gazette No. 25797, 26 April 2005; Decision No. 2009/11 E., 2011/93 K., Official Gazette No. 28114, 16 November 2011. Also see Bozkurt T.: Haklarında Özel Bir Sınırlama Nedeni Öngörülmemiş Temel Hak ve Hürriyetlerin Sınırlandırılması Sorunsalı: Özellikle Sözleşme Hürriyeti Açısından Durum, Hukuk Gündemi Dergisi, pp. 144-153, at pp. 146-148.

[542] For Turkish Constitution with explanatory texts of each provision, see <https://acikerisim.tbmm.gov.tr/xmlui/bitstream/handle/11543/1169/200901027.pdf?sequence=1&isAllowed=y> (last accessed: 30.12.2019).

judgement on an explanatory text, the mentioned precedence indicates that public interest is considered as a legitimate ground for restricting freedom of work. Our explanations above concerning the public interest in restricting right to property would generally apply to the freedom of work as well. Thus, as per the broad margin of appreciation granted to the legislator in considering public interest, it is arguable that plain packaging measures have a valid ground for restring freedom of work as well.

Apart from the principle of lawfulness and grounds for restriction, plain packaging measures must comply with other conditions under Art.13 for restricting freedom of work as well. To revert to these conditions, plain packaging measures should not harm the essence of freedom of work; they should not contravene the "letter and spirit of the Constitution", "the requirements of the democratic order of the society and the secular republic"; and they should comply with the principle of proportionality. Above, we have discussed the principle of proportionality and considered the plain packaging measures' relation with right to property in accordance with the said principle. We have further considered the concept of "essence of right". Arguably, these considerations could generally apply to plain packaging measures' interference with the freedom of work as well. In fact, it is plausible that the burden imposed by plain packaging measures amount to a lighter effect on the freedom of work than they do on right to property, simply because only one aspect of tobacco companies' freedom of work was limited by way of implementing the measures at issue, that is the use of trademarks. Being unable to freely design the appearance of the products is undeniably a significant encumbrance on the business of tobacco companies, yet they are still allowed to freely manufacture and sell their products in Turkey with brand and variant names on them. In that sense, tobacco companies' freedom of work was not as restricted as their right to property due to plain packaging laws. It can concurrently be argued that consideration of principle of

proportionality and essence of right or freedom would be less problematic in the case of freedom of work.

3. Assessment

Above, we have considered plain packaging laws of Turkey with regards to fundamental rights and freedoms protected under the Turkish Constitution. The main discussion has been on the right to property because the subject measures directly interfere with the use of trademarks which are considered property. We have also addressed freedom of work as it could serve as another basis for tobacco companies to argue on the constitutionality of the law. It can be argued that plain packaging laws restrict both right to property and freedom of work. A review of general principles and the related principles in the Constitution, as well as the jurisprudence of the Constitutional Court, indicates that plain packaging laws could be considered a legitimate restriction that was made in accordance with the Constitution and within the state's margin of appreciation in making laws for the public interest. The legitimate objectives of the state in restricting these fundamental rights arguably override the interests of the tobacco companies that were subjected to these restrictions. Similarly, we have also seen in the second chapter how the laws' objectives played a key role for the states to successfully defend their cases against legal challenges. Notably, the fact that the severe constraint imposed on the use of trademarks is an undeniable aspect of plain packaging measures have been acknowledged by the legal authorities. If it were not for the successful establishment of the objectives underlying these measures, they could be considered in violation of constitutional provisions and international treaties.

Although establishment of the legitimate objectives underlying plain packaging

laws is a focal point for the reasons above, we have highlighted that the provisions incorporating plain packaging measures in Turkey were not clearly rationalized by the legislator. In our opinion, there should have been clear and precise explanations as to the objectives of the plain packaging measures; supported with scientific evidence, reports from experts, and studies that were carried out in jurisdictions where they have been applied such as Australia. These explanations should have also included the rationale based on Turkey's positive obligations arising from its constitutional duties as well the FCTC. Considering the tribunal award in the PM v Uruguay case that acknowledged the evidentiary value of the FCTC and its guidelines, legislator could at least refer to these. Lastly, comprehensive range of tobacco control measures that have been implemented by Turkey could further be put forward to explain that the subject measures have been a part of Turkey's tobacco control policies.

D. INTERNATIONAL OBLIGATIONS OF TURKEY

1. IN GENERAL

As the second chapter detailed, challenges against a regulatory measure, such as plain packaging, could as well be brought under international law. Firstly, WTO members can challenge another member's measures on the basis that they contravene WTO agreements. As the pioneering state that mandated plain packaging, Australia successfully defended its regulation before the WTO Panel. Turkey has been a keen observer during the proceedings and submitted its views as a third party. In its submission, Turkey mainly commented on the "right of use" discussion; and the burden of proof under

Art. 20 of the TRIPS Agreement[543]. Contrary to the arguments of Australia, as well as plain packaging advocates in general, Turkey put forward an objective view from the perspective of trademark law and asserted that a positive right to use registered trademarks were inherent in the related provisions of the TRIPS Agreement. Nevertheless, Turkey maintained that this is not an absolute right and member states can restrict it on certain policy objectives, including protection of public health, to the extent that it constitutes an unjustifiable encumbrance. While implicitly stating that public health policies should be considered legitimate and "justifiable", Turkey refrained itself from expressly supporting Australian measures in terms of TRIPS compatibility, by opining that "*a deeper analysis of the case is necessary in order to maintain a delicate balance with legitimate policy concerns of Members such as the protection of public health versus effective protection of intellectual property rights*[544]." Considering the delayed legislative process of Turkey described above, it can be argued that the Turkish authorities progressed the adoption of plain packaging once they were reassured by the Panel's decision that its WTO-compliant.

Secondly, private parties can directly sue a state against an independent arbitral tribunal under the ISDS clauses enshrined in bilateral and/or multilateral trade and investment agreements. The awards of arbitral tribunals constituted pursuant to these agreements are binding on host states. We have seen that tobacco companies made use of these mechanisms under international law to nullify regulations that impact their businesses. Even when their claims are dismissed, such legal actions effectively chill or delay tobacco control efforts of many states. This chilling effect is chiefly caused by the

[543] See Executive Summary of the Arguments of Turkey.

[544] Ibid., para. 19.

tobacco industry's claims of monetary damages amounting to substantial amounts. Besides the damages claimed by the investors, states also incur considerable amounts of costs relating to arbitration proceedings. A multi-national tobacco company may endure such financial risk, while a developing country with limited resources is likely to be intimidated[545]. As mentioned in the first chapter, even developed countries such as Canada or New Zealand delayed their adoption of tobacco control measures under this financial threat[546].

In previous cases that we examined, PM acted very swiftly in initiating ISDS proceedings against both Australia and Uruguay. They also invoked domestic laws as well as international laws and carried out proceedings before various fora simultaneously. The fact that there have been no legal challenges so far, even though Turkey has enacted the plain packaging laws back in December 2018, might indicate that Turkey is safe. Nevertheless, the possibility should not be ruled out. Through the gradual transformation

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[545] As a matter of fact, Uruguay would reportedly have had to settle the case filed by PM, if it not had been for the financial support received from a philanthropic organization. See Tavernise S.: Tobacco Firms' Strategy Limits Poorer Nations' Smoking Law, New York Times, 13 December 2013, noting that *"Uruguay has acknowledged it would have had to drop its tobacco law and settle with Philip Morris International if the foundation of the departing mayor of New York, Michael Bloomberg, had not paid to defend the law."* available at <http://www.nytimes.com/2013/12/13/health/tobacco-industry-tactics-limit-poorer-nations-smoking-laws.html?action=click&contentCollection=Health&module=RelatedCoverage&region=EndOfArticle&pgtype=article> (last accessed: 30.12.2019); also see Ho C.M./Gathii J.T.: Regime Shifting of IP Law Making and Enforcement From the WTO to the International Investment Regime, 18 Minnesota Journal of Law, Science and Technology 427, 2017, at p. 10.

[546] See above, § Ch. 1 (II).

in Turkey's policies described earlier in this chapter, multinational tobacco companies have penetrated the Turkish tobacco market. Such companies have built or acquired production facilities in Turkey over time. Particularly after the privatization of TEKEL, the vast majority of the shares in the Turkish tobacco market now belong to such multinational companies[547]. These long term foreign investors enjoy a broad range of substantive protections under investment treaties that Turkey has concluded with several states. Judging from the corporate structures of multinational tobacco companies invested in Turkey, various BIT's could be invoked, signed with, inter alia, the U.S., the Netherlands, the U.K. and Switzerland[548]. These investment treaties, that were all signed around 1980's and 1990's, include conventional and rather broad provisions similar to the expropriation and FET provisions under Uruguay-Switzerland BIT, both of which were invoked by PM[549]. The treaties afford similar broad protections for investors and

[547] Tekel Devredildi, BAT Parayı Peşin Ödedi (Tekel was transferred, BAT paid the amount in advance), CNN Türk (online news article), 24 June 2008, available at:< https://www.cnnturk.com/2008/ekonomi/genel/06/24/tekel.devredildi.bat.parayi.pesin.odedi/473466.0/index.html> (last accessed: 30.12.2019). In the handover ceremony for TEKEL's transfer to the BAT, the General Manager of BAT Turkey, Johan Vandermeuelen expressed BAT's confidence in Turkey as a long-term investor by saying that: "*[this acquisition] constitutes an important base concerning BAT's growth opportunities in Turkey. By making such an investment at a time of liquidity crisis in the global markets, we have demonstrated our confidence in Turkey's future and our determination to be a long-term investor. It is a source of pride for us that BAT has become one of the biggest foreign direct investors in Turkey with this acquisition.*"

[548] See Trade Registry Records, Union of Chambers and Commodity Exchanges of Turkey, available at <https://www.ticaretsicil.gov.tr/view/hizlierisim/ilangoruntuleme.php> (last accessed: 30.12.2019).

[549] Treaty Between the United States of America and The Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, Signed 3 December 1985; Agreement on Reciprocal

they lack provisions that carve-out or limit investor claims against regulation of public policies, such as plain packaging.

2. CONSIDERATION OF THE CASES AGAINST AUSTRALIA AND URUGUAY

The arbitration case filed against Australia due to its plain packaging measures was dismissed based on the jurisdictional objections. Since the merits of PM's claims concerning plain packaging measures were not heard in this case, PM made a statement signaling that they would not give up on their investment treaty claims with the following words:

> *"There is nothing in today's outcome that addresses, let alone validates, plain packaging in Australia or anywhere else, (...) It is regrettable that the outcome hinged entirely on a procedural issue that Australia chose to advocate instead of confronting head on the merits of whether plain packaging is legal or even works*[550]*".*

Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, Signed 27 March 1986; Agreement Between the Swiss Confederation and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments, signed 3 March 1988; Agreement Between The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments, signed 15 March 1991.

[550] Hurst D.: Australia wins international legal battle with Philip Morris over plain packaging, The Guardian (online news article), 18 December 2015, available at: >https://www.theguardian.com/australia-news/2015/dec/18/australia-wins-international-legal-battle-with-philip-morris-over-plain-packaging> (last

On the other hand, the merits of the case filed against Uruguay were heard, to no avail of tobacco industry. As detailed in the previous chapter, the tribunal award dismissing all claims of PM generally favored state's regulatory powers based on public health objectives over investor's rights. While the findings of the tribunal upholding Uruguay's measures created a landmark victory for public health under international investment law, it should be noted that there is no doctrine of binding precedents in the field of international ad hoc arbitration[551]. Any claim filed before an arbitral tribunal will be considered contingent on the terms of the related agreement and based on specific facts applicable in the case. Despite the similarities between Uruguay's challenged measures and plain packaging, the factual matrix of case involving plain packaging would differ in certain aspects. Therefore, it can be argued that the risk of litigation for Turkey persists under such international agreements. In a potential investment arbitration case, the Turkish legislation that imposed measures against the foreign tobacco companies would be put under scrutiny depending on the standards afforded by the subject agreement.

On the other hand, Arbitrator Gary Born's dissenting opinion in the case against Uruguay casts doubts on certain aspects of the majority decision, particularly the standard of review and degree of state's discretion in implementing strict measures. It should be noted that Born opposed the application of the concept of "margin of appreciation" in a BIT dispute. It is uncertain whether Uruguay would still prevail in that case, in the event that Born's view was picked up by one more member of the tribunal. Regardless of the legitimate public policy objectives underlying plain packaging, the proportionality of the measure would arguably have to be judged on a view that gives less deference to state

accessed: 30.12.2019).

[551] See above, fn. 348.

when margin of appreciation doctrine is not applied.

That being said, in the event that Turkey's plain packaging measures were challenged in an investment arbitration, claims set forth by a tobacco company might be reviewed on different standards. For one, the regulations in Uruguay still allowed the use of figurative trademarks on a small part of the front and back surfaces of tobacco packaging, whereas Turkish plain packaging measures only allow use of word marks. This would be a critical point in case of plain packaging that needs to be examined by an arbitral tribunal in relation to tobacco companies' expropriation claims.

While it is unlikely that any tribunal would give less weight to the relevance of WHO FCTC and its guidelines, as well as the legitimate public policy objectives underlying plain packaging, the severity of the restrictions imposed by the measure might be further accentuated in a case against Turkey. For example, within the context of indirect expropriation claims, the consequences of non-use of trademarks under the Turkish trademark law might have a meaningful difference[552]. Because in case the investors are under the risk of completely losing their trademarks upon a revocation request, the effects of plain packaging measures could easily be considered to "substantially deprive" tobacco companies of its investments.

Concerning the FET standard, investors could accentuate their claims against Turkey's plain packaging measures on the basis that they were not adopted under due consideration of the relevant authorities and there was no reasonable connection between the objectives of the measures and the means employed to fulfill them. In line with our

[552] This opinion is based on the current circumstances in which plain packaging laws do not clearly constitute proper reasons for non-use, as described in our analysis above. In the event that plain packaging is acknowledged as a proper reason for non-use by laws or a court decision, this argument would be invalid.

evaluation above, lack of clearly stated objectives underlying Turkish legislation might be exploited here. The fact that there were no publicly available reports or statements indicating that the authorities considered any evidence on the relevance or effectiveness of the measure might help the tobacco companies to construct their claims based on arbitrary and disproportionate treatment.

3. RECCOMENDATIONS FOR TURKEY

Pursuant to our analysis above, the necessity of incorporating a trademark-saving provision into the legislation should be reiterated, for the purpose of preventing an indirect expropriation of tobacco-related trademarks. Furthermore, the public policy objectives of adopting plain packaging measures should be clearly stated by reference to the specific objectives of plain packaging as supported by scientific evidence. In fact, based on the majority judgement in the PM v Uruguay case that acknowledged the evidentiary value of the FCTC and its guidelines, a referral to these documents as well as the *amicus curiae* submitted by the health organizations may suffice.

On a broader perspective, policy options should be considered regarding the contents of trade and investment agreements that Turkey is, and will be, party to. In fact, due to the hefty legal and economic consequences of the ISDS that consequently restrict the regulatory autonomy of states, investor-state arbitration have been impugned by many critiques in the recent years, and ideas of reforming the existing system, or even abolishing ISDS altogether, have been extensively debated[553]. Particularly the cases that

[553] See e.g. Puig S./Shaffer G.: Imperfect Alternatives: Institutional Choice and the Reform of Investment Law. American Journal of International Law 112(3), 2018, pp. 361-409; Roberts A.: Incremental, Systemic,

were filed by investors against regulatory measures concerning public welfare such as health, safety and environmental protection have created such a response[554]. Following PM's investment treaty claims mounted against Uruguay and Australia, the most prominent subject of these debates have been tobacco control measures. In an effort to address the chilling effect created by such disputes, commentators put forward several policy options with regards to crafting international investment and trade agreements[555]. A number of suggestions were made by scholars to safeguard states' public policies from threat of arbitration, such as revising the language in the agreements and incorporating clear and precise carve-outs for certain measures such as plain packaging[556].

The emerging issue also created a response from several states that acknowledged the need to limit the protection afforded by international investment agreements. For this

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and Paradigmatic Reform of Investor-State Arbitration. American Journal of International Law 112(3), 2018, pp. 410-432.

[554] For an overview of investment treaty cases filed against states' public policies, see Public Citizen, Case studies: investor-state attacks on public interest policies, Washington DC 2014, available at <www.citizen.org/sites/default/files/egregious-investor-state-attacks-case-studies_4.pdf> (last accessed: 30.12.2019).

[555] See e.g. Sy D.: Safeguarding Tobacco Control Measures from the Tobacco Industry's Trade-Related Challenges Through Trade Treaty Design, 11 Asian Journal of WTO and International Health Law and Policy 325, 2016; Rimmer M.: The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products and the Trans-Pacific Partnership, Victoria University Law and Justice Journal 7 (1), 2017, pp. 76-93.

[556] See e.g. Mercurio B.: International investment agreements and public health: neutralizing a threat through treaty drafting, Bulletin of the World Health Organization 92, 2014, pp. 520-525; Schram A./Townsend B./Youde J./Friel S.: Public health over private wealth: rebalancing public and private interests in international trade and investment agreements, Public Health Research & Practice 29 (3), 2019.

reason, additional clauses that limit the scope of protection afforded to the investors, in an effort to rebalance the scale have been incorporated into some of the recent international investment and trade agreements[557]. As a response to the fear spread by the tobacco industry, sector-specific exclusions or exceptions that prevent the use of ISDS mechanism against tobacco control measures came into discussion. Meanwhile, in order to strengthen their capacity in mounting legal actions against regulatory measures such as plain packaging, tobacco industry has extensively lobbied for more advantageous provisions in investment and trade agreements to no avail[558].

It is known that Turkey acknowledges the need to reform the system of international investment and protection ISDS; and has been modifying its BITs and FTAs

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[557] For example, the model agreements drafted by the U.S., Canada and Austria included provisions that limited the scope of indirect expropriation and set out criteria that must be considered when determining whether or not one has occurred. See e.g. The Comprehensive and Economic Trade Agreement (CETA). This approach was also adopted in several regional investment agreements Asia and Africa as well. See Bernasconi-Osterwalder N./Cosbey A./Johnson L./Vis-Dunbar D.: Investment treaties & why they matter to sustainable development: questions and answers, International Institute for Sustainable Development, Winnipeg 2012, at pp. 18-19.

[558] During the course of negotiations for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP) that contained an investment chapter and allowed for ISDS, a special carve-out for tobacco control measures were included in the agreement despite the tobacco industry efforts. Although it was considered by health activists as a victory for public health, the agreement has not entered into force due to the withdrawal of the U.S. soon after Donald Trump was elected. See Fooks G./Gilmore A.B.: International trade law, plain packaging and tobacco industry political activity: The Trans-Pacific Partnership, Tobacco Control 23 e (1), 2014. For a discussion of the carve-out for tobacco control measures in the TPP, see Gruszczynski L.: The Trans-Pacific Partnership Agreement and the ISDS Carve-Out for Tobacco Control Measures, European Journal of Risk Regulation 4, 2015, pp. 652-658.

with a balancing approach with respect to the state's regulatory sovereignty and investor's rights[559]. As a state that decisively implement strong regulatory measures in consideration of public health, Turkey should consider above-mentioned suggestions made by scholars on safeguarding the regulatory discretion of the state and emulate some of the provisions that limit the scope of indirect expropriation or carve-out public health policies.

[559] Ataoğlu O.: Turkey's statement at the UNCTAD Expert Meeting on Taking Stock of IIA Reform, Geneva, 16 March 2016, available at <https://worldinvestmentforum.unctad.org/wp-content/uploads/2016/03/Statement-Turkey.pdf> (last accessed: 30.12.2019).

CONCLUSION

Tobacco epidemic has caused millions of preventable deaths each year and it will keep poisoning the next generations in the same way if it is not stopped. In order to tackle this grave public health problem, many individual and collective efforts have been made to adopt tobacco control policies. The global awareness and the commitment to tobacco control led to the preparation of FCTC, which has become one of the most widely adopted international treaties. It obliges the members to adopt a number of tobacco control measures aimed at reducing the demand for tobacco. Prohibition of all tobacco advertising, promotion and sponsorship is among these measures. When these bans are in force, tobacco companies are only left with packaging as a tool to promote their products and attract smokers and potential smokers.

Tobacco companies were deliberately using the features of packaging to communicate messages to consumers, which they were not allowed to through normal advertising. The studies indeed demonstrated that the packs served a significant function of creating an image and misleading the consumers. The use of colours, images, logos and shape of the packs were all designed to appeal certain consumers. In that vein, the cigarette packs were used as a key vehicle for the promotion and advertising of tobacco products, hence they have become “mobile billboards” or “silent salesmen” for the tobacco industry. Additionally, certain features of packages served the purpose of creating false perceptions concerning the health effects of smoking, and reducing the effectiveness of the health warnings.

The idea of plain packaging emerged in face of these negative impacts of packaging that were demonstrated through scientific evidence and experimental studies. It standardizes all features including the colour, shape and size of the packaging. Tobacco

companies are only allowed to place a brand and variant name in a prescribed font, colour and size on the packaging. It basically eliminates the ability of tobacco companies to use packaging as means of communicating with the consumers in order to attract them. In that vein, it was the next step in tobacco control policies that complemented previous measures aimed to prohibit advertising and promotion.

Although plain packaging was not included in the substantive provisions of the FCTC that oblige member states to adopt certain measures, it was recommended under the guidelines for the implementation of Articles 11 and 13. Adoption of the FCTC has surely been the turning point in the history of tobacco control for many reasons. It particularly strikes as the most significant milestone that encouraged states to mandate plain packaging. Mentioned encouragement was much needed considering the fact that there had been several countries that renounced mandating this measure after giving a lot of thought, due to the extensive efforts of the tobacco industry. As an international treaty that was widely adopted, the FCTC and its guidelines has served as an assurance for the states to regulate such measure. Furthermore, the fact that FCTC and its guidelines were based on scientific studies approved by the WHO constituted a significant legal ground for the adoption of the measure.

Against these stated objectives of plain packaging, there were a number of oppositions arguing that the measure was too restrictive and unlawful. The opposition against plain packaging was of course led by the tobacco industry. They were indeed known to make use of legal arguments concerning tobacco control measures in order to intimidate the governments that they would be sued before international tribunals. However, there were some significant arguments about plain packaging that were more than mere far-fetched claims crafted by the industry just to prevent it from being implemented globally. Hence, legal scholars in various fields such as international trade,

trademark law, international investment law and human rights extensively debated them. Against this background, the legal outcomes of the challenges mounted against plain packaging laws were highly anticipated.

In spite of tobacco industry's efforts to spread the fear of costly legal challenges in order to dissuade governments from adopting plain packaging, Australia went ahead and enacted the TPP Act in 2012. Tobacco industry's response was very quick. In fact, the constitutional challenge and the investment arbitration claim were mounted in the very same day. Later, the law was also complaint of by some WTO members before the WTO dispute settlement panel. In the meantime, Uruguay was also sued by PM before an investment treaty arbitration due to its so-called SPR and 80/80 measures. The outcome of the case against Uruguay became more important because the investment treaty claims against Australia were dismissed on jurisdiction. Owing to the similarities in the factual narrative of both cases, the lessons for plain packaging in terms of international investment law could be derived from this case.

In the second chapter, we have examined the merits of the constitutional challenge and WTO complaints against Australia, as well as the investment treaty claims against Uruguay. In all cases, sound arguments were put forward against tobacco control measures that restrict tobacco companies' rights. The key fact that was generally at the center of all main claims were related to trademarks. As a matter of fact, prohibiting tobacco companies from using their figurative and composite trademarks (some of which have been used for many years and have become very valuable) is a severe restriction. From the perspective of trademark law, although use of brand and variant names in a prescribed form were allowed, it can be argued that the main features of marks that serve the function of distinguishing products from others were eliminated. Features such as colour, logos, and other stylized elements of the brand are in fact essential.

Against this background, a number of arguments were put forward based on the prohibition on the use of tobacco-related trademarks. Tobacco companies argued that their property (in form of trademarks) were "acquired" or "expropriated" by the government without due compensation. On the basis that there was not enough evidence on the subject measures' relevance and effectiveness on serving their purposes, they also contended that the measures were disproportionate and arbitrary. It was argued that such measures that severely impact the business of the investors were not reasonable, and alternative measures that were less restrictive could have been used instead.

Plain packaging's compatibility with WTO agreements, namely the TBT Agreement and the TRIPS Agreement were also of great importance. Under the TBT Agreement, the main argument was that plain packaging unjustifiably restricted trade. Under the TRIPS Agreement, there were a number of arguments with regards to protection of trademarks. Most of them were crafted by means of interpreting the related provisions in a way that required member states to grant a right to use trademarks. On the other hand, particularly claims under Art. 20 expressly related to "use of trademarks", thus they constituted the strongest arguments against plain packaging.

In the end, Australia and Uruguay's measures were upheld in all of the mentioned proceedings. Notably, contrary to the states' statements of defense, the WTO Panel and the Arbitral Tribunal acknowledged that prohibition on the use of trademarks did in fact restrict certain rights of the tobacco companies both under WTO laws and international investment law. However, the bottom line of the judgements that favored states' regulatory powers were that the subject restrictions were justified. This justification chiefly stemmed from the legitimate objectives underlying the measures that considered improvement of public health. The FCTC and its guidelines also played a key role in demonstrating the legitimacy of the said objectives.

From the perspective of trademark law, the most controversial issue that emerged with plain packaging was whether trademark registration granted a positive right to use trademarks, or it merely provided a negative right to prevent others from using it. Although there were slight differences in the consideration of this issue, "positive right" approach that has been vigorously argued by the tobacco industry and supported by some scholars, were dismissed in all three cases. This is particularly noteworthy considering the fact that, trademark legislation of Australia contained an exclusive "right to use" clause. Regardless of the nature of the right granted by trademark registration, the key point in these disputes have been that trademark rights were not "absolute", hence they could be restricted for good reasons. This issue that emerged with the adoption of plain packaging could have further implications for the exclusive rights under intellectual property regimes in the future.

As the public health policies surpassed the interests of tobacco companies in all of these legal battles, the regulatory chill on plain packaging has begun to resolve and a number of other countries followed Australia. Nevertheless, there are good reasons to doubt that tobacco industry will easily give up on their claims. First of all, the dissenting opinions that were issued in the constitutional challenge against Australia and the investment treaty arbitration against Uruguay reveal that controversies on certain legal aspects about plain packaging might remain on the agenda for some time. The controversy on the issues such as how the balancing between the private rights (such as trademarks) and public policy objectives should be done; and what kind of evidence or scientific studies can justify public policies that restrict private rights can be further exploited by the tobacco industry and other critiques of plain packaging. The fact that there is generally no doctrine of precedents in international arbitration makes the possibility of further disputes and different interpretations from arbitral tribunals, depending on particular

BIT's and factual narratives, considerably likely. On the other hand, WTO Appellate Body will review the appeals filed against the Panel Decision, meaning that Australia's victory is not yet the final decision on the WTO front. For these reasons, any state that adopt plain packaging measures should carefully consider the risks during the legislative process.

In order to consider Turkey's position with regards to the implications derived above, we have first explored the history of tobacco in Turkey and tobacco control policies. Turkey, which had been a tobacco producing and exporting country was gradually transformed through state policies. These policies modified the Turkish market which is now almost completely controlled by the multinational tobacco companies. Considering the history of the tobacco market and statistical data on smoking prevalence, it appears that the state fueled the flames caused by tobacco consumption by strengthening the big tobacco companies in Turkey.

Nevertheless, Turkey has been consistently adopting tobacco control measures since the mid 1990's. Although there are some questionable aspects of Turkey's tobacco control policies, such as lack of measures aimed to reduce tobacco supply and problems in the implementation of certain legislation; it can be argued that the adoption of plain packaging fits into the country's comprehensive tobacco control regime that has been progressing.

Examination of the related provisions of the legislation reveals that Turkey's plain packaging measures are consistent with Australia, in the ways it regulates the packaging, health warnings and use of brand names. Nevertheless, there are some deficient aspects that were criticized by public health experts, such as the lack of standardization of the shape and size of the packages, as well as the cigarette sticks.

On the legal perspective, two deficiencies in Turkey's legislation stand out. First,

the law and the regulations lack clear and precise statement of the objectives of plain packaging. Second, there are no trademark-saving provisions as adopted in other jurisdictions.

Even though the argument that trademarks confer positive right to use was dismissed in all cases mentioned-above, lack of trade-mark saving provision in the law is prone to cause problems in the future. In fact, there are grave legal consequences attached to non-use of trademarks under the Turkish trademark law. Most importantly, the law provides that a non-used trademark is subject to revocation. Given that figurative trademarks related to tobacco products registered in Turkey will not be used anymore due to plain packaging, they may be subject to such consequences. Although it is arguable that the non-use caused by regulatory measures such as plain packaging constitutes "proper reason" for non-use, there are not enough basis under the legislation or the case law that provides a clear answer to this issue. Therefore, the legislator should incorporate a provision that clearly defines plain packaging measures as a proper reason for non-use, as Australia and other countries did.

From the perspective of constitutional law, plain packaging restricts certain fundamental rights and freedoms. For one, it restricts the right to property by prohibiting the use of tobacco companies' IP. It arguably restricts freedom of work as well. We have considered the limits of restricting fundamental rights and freedoms under the Turkish Constitution, and mentioned the key points that should be taken into account with regards to constitutionality of plain packaging. In parallel with the judgements mentioned in the second chapter, we concluded that the restrictions imposed on tobacco companies by means of implementing plain packaging should be considered justifiable under the Turkish Constitution because it is a public health policy adopted with the purpose of serving the public interest. Nevertheless, it should be noted that lack of clear and precise

statement of plain packaging's objectives do not comply with general principles regarding law-making procedures. It may further allow room for tobacco companies to allege that the measure was arbitrary and disproportionate.

Finally, Turkey's plain packaging measures were discussed in consideration of international trade and investment agreements. As a matter of fact, the tobacco industry has not yet suffered a decisive defeat about their claims based on the protection afforded by international investment treaties. In order not to enable the tobacco companies invested in Turkey to make a strong case against Turkey before international arbitral tribunals, strict attention should be paid to how plain packaging is implemented. In that vein, it should be ensured that tobacco companies do not entirely lose their trademarks due to non-use, by incorporating a special provision in the law. From a broader perspective, Turkey should carefully weigh its policy options regarding the protection afforded to investors under international agreements. Carve-outs and exemptions for public health measures could be a way forward.

As final words, we can say that Australia and Uruguay's legal victories paved the way for plain packaging of tobacco products to become a new global standard. Although there are still risks of litigation, it seems more likely that other states would prevail in potential litigation as well. Nevertheless, tobacco products are different than any other goods due to its lethal effects. Implementing plain packaging for other products without comprehensive studies and international consensus could lead to adverse impacts. The tobacco industry claims amounting to billions of dollars demonstrate how grave the consequences would be in case a similar policy would be found to violate the protection standards granted to investors under international law. Therefore, public health advocates should not be carried away by the euphoria of victory and opt for plain packaging for different types of products quickly.

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ABSTRACT

This thesis aims to consider the Turkish legislation that introduced plain packaging in Turkey, by using the implications derived from the landmark cases mounted against similar measures of other jurisdictions, namely Australia and Uruguay. This thesis is comprised of an introduction, three separate chapters, and a conclusion.

In the first chapter, it discusses what is plain packaging and how it emerged within the context of tobacco control policies. The reasons underlying the adoption of this measure are explained by providing the purposes it achieves to serve. Then, as an important milestone in global tobacco control policies, as well as a foundation for plain packaging, it explores the FCTC and its relevant guidelines.

The second chapter first explores the Australian plain packaging legislation and three legal challenges mounted against it: the constitutional challenge, investment treaty arbitration, and WTO complaints. Thereafter, it explores the Uruguayan measures and the investment treaty arbitration filed against them. Through engaging in these disputes, the main legal issues concerning plain packaging of tobacco products are highlighted.

Third chapter addresses the Turkish legislation that introduced plain packaging of tobacco products. First, it provides a brief overview concerning the history of Turkish tobacco market and tobacco control policies. Second, it evaluates the legislation that incorporated plain packaging measures and the related regulations. Then it considers the plain packaging's compatibility with Turkish trademark law and constitutional law. Finally, it discusses the main implications for Turkey under its international obligations.

While this thesis draws the conclusion that the outcomes of the cases against Australia and Uruguay were important victories for public health; it also underlines that there is still a need to be cautious when adopting such restrictive measures.

ÖZET

Bu tez, başlıca Avustralya ve Uruguay'daki benzer düzenlemeler aleyhine açılan davalardan yapılan çıkarımlar doğrultusunda, Türkiye'deki tütün ürünlerinin düz paketlenmesini düzenleyen mevzuatı incelemeyi amaçlamaktadır. Çalışmamız giriş, ayrı üç bölüm ve sonuçtan oluşmaktadır.

İlk bölümde düz paketleme ve düz paketlemenin tütün kontrolü bağlamında nasıl ortaya çıktığından bahsedilmektedir. Düz paketleme ile yerine getirilmesi hedeflenen amaçlar ortaya konarak bu düzenlemenin altında yatan nedenler açıklanmaktadır. Ardından, küresel tütün kontrol politikaları açısından bir köşe taşı olmanın yanı sıra; düz paketleme için de bir yasal temel arz eden TKÇS ve ilgili kılavuzlar incelenmiştir.

İkinci bölümde ilk olarak Avustralya'nın düz paketleme mevzuatı incelenmiş ve anayasaya aykırılık davası, uluslararası yatırım tahkimi davası ve DSÖ şikâyetleri olmak üzere mevzuat aleyhine açılan üç dava ele alınmıştır. Daha sonra Uruguay'ın ilgili düzenlemeleri ve bu düzenlemeler aleyhine açılan yatırım tahkimi davası incelenmiştir. Bahsi geçen davaların incelenmesiyle, tütün ürünlerinin düz paketlenmesine ilişkin temel hukuki meseleler ortaya konulmuştur.

Üçüncü bölümde ise düz paketleme düzenlemesini getiren Türk mevzuatı ele alınmaktadır. İlk olarak, Türkiye tütün piyasası ve ülkedeki tütün kontrolü politikalarının tarihçesi özetlenmiştir. Daha sonra düz paketleme düzenlemesini getiren kanun hükümleri ve ilgili yönetmelik hükümleri değerlendirilmiştir. Ardından düz paketlemenin Türk marka hukuku ve anayasa hukuku bağlamında uyumu değerlendirilmiştir. Son olarak ise Türkiye'nin uluslararası yükümlülükleri doğrultusunda bazı temel çıkarımlardan bahsedilmiştir.

Tez çalışmamız, Avustralya ve Uruguay aleyhine açılan davaların sonuçlarının

kamu sağlığı politikaları bakımından önemli zaferler olarak değerlendiği sonucunda varmakla birlikte; bu tür kısıtlayıcı önlemler alırken devletlerin ihtiyatlı davranması gereğinin altını çizmektedir.